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Supreme Court of the United States

OCTOBER TERM, 1930

No. 63

ABIE STATE BANK, APPELLANT,

vs.

CHARLES W. BRYAN ~~ARTHUR J. WEAVER~~, AS GOVERNOR OF THE STATE OF NEBRASKA; CLARENCE G. BLISS, AS SECRETARY OF THE DEPARTMENT OF TRADE AND COMMERCE; ~~WILLIS M. STEBBINS~~, AS TREASURER, ETC., ET AL. T. W. BASS

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEBRASKA

FILED MARCH 18, 1929

(34,881)

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[fols. a & 1 & 2] [Captions omitted]

[fol. 3]

IN DISTRICT COURT OF LANCASTER COUNTY

ABIE STATE BANK, Abie, Nebraska, Plaintiff,

vs.

ADAM MCMULLEN, as Governor of the State of Nebraska, and Clarence G. Bliss, as Secretary of the Department of Trade and Commerce, Defendants

PETITION—Filed Dec. 21, 1928

The plaintiff for cause of action against defendants and each of them states:

1. It is a corporation organized under the laws of Nebraska as a bank and has been engaged in the banking business at the town, or village, of Abie in said state for the past twenty-four years. It brings this suit not only on behalf of itself, but on behalf of each of the 558 state banks whose names are set out in Exhibit "A" attached hereto and made a part hereof, and in that regard alleges that the statements and matters herein set forth respecting this plaintiff apply equally well, insofar as this controversy is concerned, to each of the state banks whose names are set forth in Exhibit "A," which gives the name of the bank, [fol. 4] the place of doing business and the year its charter issued and the date it commenced doing business.

2. Plaintiff states that Adam McMullen is now Governor of the State of Nebraska and Clarence G. Bliss is now Secretary of the Department of Trade and Commerce; that on the 15th day of December, 1928, the said Department of Trade and Commerce, claiming to act under the authority conferred upon it by Section 8028 of the Compiled Statutes of Nebraska, as amended by Section 26, H. R. 272, 1923 Session Laws, made a levy against each of the state banks of Nebraska of one-fourth of one per cent of their average daily deposits for the year 1928, and the said Clarence G. Bliss, as Secretary of the Department of Trade and Commerce has made demand of this plaintiff and of each of the state banks of Nebraska to pay said sums into the De-

positors' Guarantee Fund on or before the 26th day of December, 1928.

3. Your petitioner further alleges that said levy or special assessment is illegal, invalid and unjust for the following reasons:

(a) That the said special assessment provided for in Section 8028, as amended, is not a debt or liability of this plaintiff, but is directed against the capital stock of corporations engaged in the business of banking.

(b) The said special assessments and the assessment provided for in Section 8028, as amended, if paid by this bank and the other state banks of Nebraska will destroy the state banking system in a few years and compel such state banks as can to become national banks, and all other banks, to liquidate.

(c) Said special assessments set forth in Section 8028 are unfair, unjust and discriminatory for the reason that the same are not attempted to be levied against national [fol. 5] banks of this state, or collected from them, and said national banks are engaged in a business similar to that of the plaintiff and other state banks and in direct competition with them.

(d) That the assessments demanded and collected of the state banks each year to be paid into the Guarantee Fund exceed eight (8%) per cent per annum of the entire capital stock of the state banks of Nebraska, and exceed the net annual earnings of the state banks. Wherefore, plaintiff states that said special assessments are illegal, unjust and confiscatory.

(e) That based upon the present status of the Depositors' Guarantee Fund and the experience of the state banking business in Nebraska for the past eight years, said special assessments if required to be paid by the state banks of Nebraska, in a few years, at most, will deplete or wipe out the entire capital of the state banks,—the said special assessments having exceeded the net annual earnings of the banks for a number of years past.

(f) That a large number of the state banks, as set forth and as shown by the list attached to this petition, received

their charters from the State of Nebraska and began the operation of a banking business in the State of Nebraska long prior to the enactment of the Bank Guaranty Law, and that all of the state banks which have been chartered, both before and after the enactment of said law, have invested in properties peculiarly fitted for banking purposes, and which properties depend largely for their value upon the continuation of such use, and that the value of such properties will be in great part and to a large extent destroyed if such banks are compelled to abandon such business; and that all of such banks have no election but to either cease business or be compelled to pay such assessments. Plaintiff further says that the state banks operating under permission and grant of authority from the state have accumulated vested rights in property, capital and assets, and that the excessive and confiscatory assessments made against such [fol. 6] banks not only exhaust their earnings but take from them their capital and assets and destroy their vested rights in properties accumulated under the permission of said state, and that if by such assessments said banks are compelled to cease business, that the values of such properties peculiarly fitted for banking uses is practically and in large part destroyed and confiscated.

4. Your petitioner further states that the assessments exacted of the state banks of Nebraska since the year 1920 aggregate in excess of $16,000,000.00; that since the year 1920, when such special assessments for the first time were exacted of the state banks of Nebraska, more than 270 of the said state banks have been compelled to cease business because of insolvency, brought about, in part, by the payment of such special assessments,—the total number of state banks in the year 1920 being 1009 and in September, 1928, 739; that the average daily deposits for the year 1928 amounted to approximately 258 millions of dollars, whereby the special assessment provided for in Section 8028, as amended, together with the regular assessment provided for in Section 8026, if collected from the state banks, would require payment by them of approximately the sum of $1,600,000.00 per year; that because of the exactions of such assessments from the state banks of Nebraska, the capital stock of many of the state banks now in business has been depleted, the number thereof being approximately three

hundred, and if said special assessments shall be required to be paid by the state banks of Nebraska for three years in succession, it will result in practically two-thirds of the present state banks being thrown into a receivership.

5. Plaintiff further alleges that the entire capital stock of the 736 state banks now doing business in Nebraska is less than $19,328,500.00, and there is now due and owing [fol. 7] from the Depositors' Guarantee Fund to depositors of the state banks of Nebraska which have failed, upwards of $10,000,000.00; that under the authority conferred upon it by the laws of this state, the Department of Trade and Commerce has taken over and is now operating a large number of banks which are insolvent and which should now be in receivership, and that the liability of the Depositors' Guarantee Fund to the depositors of such banks is upwards of $16,000,000.00; that there is now in cash in said Depositors' Guarantee Fund only the sum of, to-wit, $2000.00 with which to pay said claims and that while the said Department of Trade and Commerce has taken over the assets of a large number of banks which have failed for the purpose of paying depositors of such banks, the entire amount, after process of liquidation, which would take a long time to realize from such assets, would not exceed the sum of $10,000,000.00, whereby your petitioner states that the deficit in the Depositors' Guarantee Fund is upwards of $16,000,000.00.

6. Your petitioner further alleges that there if now doing business in the State of Nebraska, approximately 150 national banks, all of which do a business similar to that of state banks and are in direct competition with them; that none of the national banks, or the stockholders thereof, are required to pay said special assessments, or any assessments, to the Guarantee Fund, whereby your petitioner alleges there is discrimination in attempting to collect said special assessments and that said state banks are denied the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

7. Plaintiff further alleges that the said special assessment complained of is illegal, unjust and confiscatory and is unconstitutional and in violation of the Fifth Amendment of the Constitution of the United States and in violation

of the Fourteenth Amendment of the Constitution of the [fol. 8] United States, in that it attempts to deprive this plaintiff and the state banks of Nebraska of their property without due process of law and denies to them the equal protection of the law, and further states that the same also is in violation of Section 3, of Article I of the Constitution of the State of Nebraska in that it deprives them of their property without due process of law.

8. Plaintiff further states that the said special assessment is not now being levied for any public purpose but is being levied for the sole and only purpose of paying claims of depositors in failed banks that are already allowed, and will not and cannot be used for the purpose of creating a fund for the stabilizing of banking conditions in the State of Nebraska. Public officials having custody of public moneys are now no longer looking to the Depositors' Guaranty Fund for protection but are demanding of state banks that bond be furnished to protect deposits of public money.

9. Plaintiff further states that the purpose and object of the Legislature in imposing a tax upon state banks for the Guarantee Fund was to stabilize the banking business and to protect depositors of such banks and that while a requirement to pay a reasonable fixed sum into the Guarantee Fund might afford some protection as long as the claims against the Guarantee Fund did not exceed the available moneys in its hands to pay the same, the present status of the Guarantee Fund is such that to require solvent banks in this state to pay the exactions required by Section 8028 does not in any way protect depositors in said banks or stabilize the banking business, but on the contrary constitutes a menace to the continuance of the state banking system and to the payment of depositors in solvent banks.

10. Your petitioner further alleges that the defendants, by virtue of their office, upon the failure of plaintiff to pay said [fol. 9] demand, have threatened and will attempt to force collection of the said levy, and unless restrained by the injunctive order of this court will attempt to take possession of the business and property of this plaintiff and place the said bank under charge of the Guarantee Fund Commission, and the same condition arises with respect to each of the banks set forth in Exhibit "A"; that the taking posses-

sion of the business of this plaintiff and of other state banks of Nebraska by the said defendants by virtue of their office, would result in serious and irreparable damage and loss to the plaintiff and the other state banks, and that your petitioner and the other state banks of Nebraska have no adequate remedy at law.

Wherefore, your petitioner prays that a restraining order and temporary injunction be issued forthwith against the defendants, and each of them, enjoining and restraining said defendants, and their successors in office, from collecting the said special assessments from this plaintiff and other state banks set forth in Exhibit "A," and from taking possession, or attempting to take possession of the banking business of this plaintiff and the other banks set forth in Exhibit "A," and that on the trial of this case the said injunctive order be made permanent and that the court order and decree that this plaintiff and the other banks set forth in Exhibit "A" are not required to pay said special assessment, or any part thereof, and that the defendants and each of them be further enjoined from levying or attempting to levy any of the special assessments called for in Section 8028, as amended, against this plaintiff or any of the other state banks set forth in Exhibit "A," and that it have such other and further relief as may be just and equitable, including its costs.

Hainer, Flansburg & Lee, Gaines, McGilton, Van Orsel & Gaines, Courtright, Sidner, Lee & Gunderson, Attorneys for Plaintiff.

[fol. 10] *Duly sworn to by F. H. Gaines. Jurat omitted in printing.*

EXHIBIT "A" TO PETITION

Year chartered	Place of business	Name of bank
1904	Abie	Abie State
1918	Adams	Adams State
1903	Ainsworth	Citizens State
1908	Albion	Citizens State
1919	Albion	Farmers State
1919	Alliance	Guardian State
1900	Alma	Harlan County Bank

Year chartered	Place of business	Name of bank
1901	Alvo	Farmers & Merchants
1908	Amherst	Commercial State
1909	Anoka	Boyd County Bank
1903	Anselmo	Anselmo State
1915	Ansley	Security State
1894	Arapahoe	Arapahoe State
1905	Arapahoe	Citizens State
1888	Arcadia	Arcadia State
1890	Arlington	Arlington State
1917	Arnold	Security State
1916	Arthur	Arthur State
1913	Ashby	Grant County State
[fol. 11]		
1883	Ashland	Farmers & Merchants
1908	Ashton	Ashton State
1888	Ashton	Bank of Ashton
1914	Atkinson	Security State
1903	Atlanta	Atlanta State
1906	Auburn	Auburn State
1910	Aurora	Farmers State
1906	Aurora	Fidelity State
1915	Avoca	Farmers State
1884	Axtell	Bank of Axtell
1907	Axtell	Farmers & Merchants
1912	Ayr	Farmers State
1892	Bancroft	Citizens Bank
1906	Barada	Barada State
1890	Barneston	Bank of Barneston
1903	Barneston	Commercial State
1906	Bartlett	Bartlett State
1897	Bartley	State Bank of
1902	Bassett	Commercial Bank
1919	Battle Creek	Farmers Bank
1889	Battle Creek	Battle Creek Valley
1889	Bayard	Bank of Bayard
1908	Beatrice	Beatrice State
1909	Beatrice	First State Savings
1914	Beatrice	Nebraska State
1920	Beatrice	Security Savings

Year chartered	Place of business	Name of bank
1902	Beatrice	Union State
1898	Beaver City	First State
1905	Beaver Crossing	Citizens State
1902	Bee	State Bank of Bee
1910	Belgrade	Farmers State
[fol. 12]		
1902	Bellwood	Bank of Bellwood
1886	Belvidere	State Bank of
1919	Benkelman	Farmers & Merchants St.
1928	Bennington	Bank of
1885	Bertrand	First State
1924	Berwyn	Farmers State
1905	Bethany	First State
1906	Big Springs	Farmers State
1904	Blair	Citizens State
1919	Blair	Farmers State
1891	Bloomfield	Farmers & Merchants St.
1901	Blue Springs	Blue Springs State
1885	Boelus	Boelus State
1904	Brady	Bank of Brady
1886	Brainard	Bank of Brainard
1915	Brainard	Brainard State
1906	Brainard	Farmers State
1889	Brock	Bank of Brock
1924	Bristow	Nebraska State
1899	Broken Bow	Broken Bow State
1917	Broken Bow	Nebraska State
1905	Broken Bow	Security State
1919	Brule	Farmers State
1890	Bruno	Bruno State
1912	Bruno	Farmers & Merchants
1902	Brunswick	Brunswick State
1928	Burchard	State Bank of
1892	Burr	American Bank
1913	Burton	Burton State
1923	Bushnell	American State
1902	Byron	Farmers & Merchants
[fol. 13]		
1908	Burwell	Farmers Bank
1887	Burwell	First State

Year chartered	Place of business	Name of bank
1902	Cairo	Cairo State
1910	Cairo	Farmers State
1906	Callaway	Farmers State
1887	Callaway	Seven Valley State
1907	Cambridge	Cambridge State
1907	Campbell	Farmers State
1890	Carleton	Citizens State
1925	Carroll	Carroll State
1887	Cedar Bluffs	Bank of Cedar Bluffs
1892	Cedar Bluffs	Farmers & Merchants
1893	Cedar Bluffs	Citizens State
1919	Cedar Bluffs	Farmers State
1902	Center	Center State
1892	Central City	Platte Valley State
1911	Ceresco	Farmers & Merchants
1915	Chaleo	German American State
1917	Chapman	Farmers State
1912	Chappell	Chappell State
1919	Chappell	Deuel County State
1919	Chester	Chester State
1886	Chester	Farmers State
1890	Clarkson	Clarkson State
1905	Clarkson	Farmers State
1919	Clatonia	Clatonia State
1896	Clatonia	Farmers Bank
1906	Clay Center	Clay Center State
1887	Clay Center	Commercial State
1899	Cody	Bank of Cody
1917	Cody	Ranchers State
1917	College View	Farmers State
[fol. 14]		
1899	Colon	State Bank of
1917	Columbus	Farmers State
1906	Comstock	Citizens State
1909	Comstock	Farmers & Merchants Bank
1890	Cook	Farmers Bank of
1918	Concord	Farmers State
1910	Cortland	Farmers State
1905	Cotesfield	First State

Year chartered	Place of business	Name of bank
1884	Creighton	Bank of Creighton
1898	Creston	Citizens State
1882	Crete	First State
1917	Crookston	Farmers State
1886	Culbertson	The Culbertson Bank
1911	Curtis	Curtis State
1886	Curtis	Security State
1906	Cushing	Cushing State
1888	Dakota City	Bank of Dakota City
1908	Dalton	Dalton State
1917	Dalton	Farmers State
1888	Danbury	Bank of Danbury
1894	Davenport	Jennings State
1903	Davey	Farmers State
1909	David City	Butler County State
1909	David City	City Savings Bank
1895	Daykin	Jefferson County Bank
1906	Denton	Denton State
1914	Deshler	Deshler State
1908	Deshler	Farmers & Merchants
1882	DeWitt	Farmers & Merchants
1903	DeWitt	Home State Bank

[fol. 15]

1915	Dickens	First State
1914	Diller	Citizens State
1904	Diller	Diller State
1886	Doniphan	Bank of Doniphan
1911	Dorchester	Bank of Dorchester
1907	Dorchester	Citizens State
1919	Douglas	Farmers State
1886	Dubois	State Bank of
1907	Dunbar	Farmers Bank
1904	Dwight	Dwight State
1892	Eagle	Bank of
1903	Eddyville	Eddyville State
1882	Edgar	Clay County State
1879	Edgar	State Bank of
1917	Edison	Farmers & Merchants
1919	Elgin	Farmers & Merchants
1900	Elba	Elba State Bank

Year chartered	Place of business	Name of bank
1917	Eli	Your Bank of Eli
1893	Elk Creek	State Bank of
1915	Elk Horn	Farmers State
1888	Elkhorn	State Bank of
1907	Ellis	Ellis State
1889	Elmwood	American Exchange
1914	Elmwood	Elmwood State
1907	Elsie	Commercial State
1918	Elsie	Equity State
1910	Elwood	The Town Bank
1910	Elyria	Elyria State
1890	Emerson	Farmers State
1907	Emmet	Emmet State
1917	Enders	First State

[fol. 16]

1905	Ericson	Ericson State
1889	Eustis	Farmers State
1906	Eustis	Pioneer Bank
1873	Fairbury	Harbine Bank of
1895	Falls City	Falls City State
1919	Falls City	Nebraska State
1880	Falls City	Richardson County Bank
1904	Farnam	Farnam Bank
1902	Farnam	State Bank
1903	Farwell	Farwell State
1907	Farwell	First State
1901	Filley	State Bank of
1891	Firth	Firth Bank
1907	Fordyce	Fordyce State
1914	Fort Calhoun	Fort Calhoun State
1889	Fort Calhoun	Washington County Bk.
1912	Foster	Farmers & Merchants
1894	Franklin	Franklin Exchange
1901	Frankin	Franklin State
1904	Fremont	Fremont State
1918	Friend	Friend State
1884	Friend	Merchants & Farmers
1905	Funk	Funk State
1904	Garland	Germantown State
1928	Giltner	Giltner State

Year chartered	Place of business	Name of bank
1918	Gladstone	State Bank of
1909	Glenvil	Farmers State
1889	Glenvil	State Bank of
1903	Goehner	Goehner State
1919	Gordon	American Bank
[fol. 17]		
1915	Gothenburg	Farmers State
1906	Gothenburg	First State
1902	Graf	Bank of
1901	Grand Island	Commercial State
1917	Grand Island	Nebraska State
1919	Grand Island	Peoples State
1910	Gresham	Gresham State
1910	Gretna	Bank of *Gretna*
1885	Guide Rock	Bank of Guide Rock
1917	Gurley	Farmers State
1916	Haig	State Bank of
1919	Hallam	Farmers State
1898	Hallam	Hallam Bank
1912	Hampton	Farmers State
1912	Hansen	Hansen State
1905	Harbine	State Bank of
1890	Harrisburg	Banner County Bank
1915	Hartington	Cedar County Bank
1918	Hastings	State Bank of
1900	Havelock	Farmers & Merchants
1918	Havens	State Bank of
1913	Hayland	First State
1890	Hay Springs	Northwestern State
1907	Hazard	Hazard State
1905	Heartwell	Heartwell State
1914	Hebron	Hebron State
1874	Hebron	Thayer County Bank
1889	Henderson	Bank of Henderson
1902	Henderson	Farmers State
1905	Hendley	Farmers State
[fol. 18]		
1907	Herman	Herman State
1888	Herman	Plateau State

Year chartered	Place of business	Name of bank
1903	Hershey	Bank of Lincoln Co.
1902	Holbrook	Bank of Holbrook
1917	Holbrook	Security State
1912	Holdrege	Phelps County Bank
1925	Holdrege	State Bank
1925	Holmesville	State Bank of
1902	Holstein	First State
1922	Homer	Home State
1903	Homer	Security State
1882	Hooper	Hooper State
1915	Horace	Horace State
1907	Hordville	First State
1900	Hoskins	Hoskins State
1899	Howe	Bank of Howe
1887	Howells	Colfax County
1902	Howells	Howells State
1903	Hubbards	Hubbard State
1881	Hubbell	Hubbell Bank
1915	Humboldt	Home State
1904	Humboldt	Nebraska State
1915	Humphrey	Farmers State
1905	Huntley	State Bank of
1897	Hyannis	Bank of Hyannis
1887	Imperial	Farmers & Merchants
1906	Indianola	Farmers State
1912	Inland	Farmers State
1918	Irvington	State Bank of
1902	Ithaca	Farmers State
[fol. 19]		
1901	Jensen	State Bank of
1916	Johnson	First State
1892	Julian	Bank of Julian
1878	Juniata	State Bank of
1917	Kearney	American State
1890	Kearney	Farmers State
1906	Keene	Farmers State
1908	Kenesaw	First State
1884	Kenesaw	Kenesaw State
1915	Kennard	Home State
1909	Keystone	Bank of Keystone

Year chartered	Place of business	Name of bank
1919	Kilgore	Farmers State
1917	Kimball	American State
1886	Kimball	Bank of Kimball
1911	Kramer	Farmers State
1906	Lanham	State Bank of
1887	Lebanon	State Bank of
1910	Leigh	Leigh State
1906	Lemoyne	Lemoyne State
1906	Leshara	Leshara State
1905	Lewellen	Bank of Lewellen
1915	Lewellen	Farmers State
1901	Lewiston	Bank of Lewiston
1889	Lexington	Dawson Co. Bank
1916	Lexington	Farmers State
1886	Lexington	Lexington State
1897	Liberty	St. Bank of Liberty
1909	Lincoln	Continental State
1911	Lincoln	Nebraska State
1900	Lindsay	Farmers & Merchants
[fol. 20]		
1887	Linwood	Farmers & Merchants
1909	Lisco	Lisco State
1889	Lodgepole	First State
1900	Loomis	Farmers State
1884	Louisville	Bank of Commerce
1890	Lorton	Bank of Lorton
1915	Louisville	Home State Bank
1904	Loup City	Loup City State
1899	Lynch	Bank of Lynch
1901	Lynch	Farmers State
1880	Lyons	The Farmers Bank
1903	Macon	Macon State
1918	Madison	State Bank of Madison
1893	Malmo	Farmers & Merchants
1917	Malmo	Malmo State
1907	Manley	Manley State
1905	Martell	Martell State
1923	Maskell	Security State
1911	Mason City	Farmers State
1900	Mason City	Mason City Banking Co.

Year chartered	Place of business	Name of bank
1916	Maywood	Farmers Security Bk.
1920	McCook	. Farmers & Merchants State
1904	McCool Junction	Farmers & Merchants Bank
1924	McGrew	. Farmers State
1901	McLean	McLean State
1885	Mead	. Bank of Mead
1905	Meadow Grove	Security Bank
1913	Melbeta	. State Bank of
1886	Merna	. Bank of Merna
1900	Merriman	. Anchor Bank
[fol. 21]		
1916	Millard	. Farmers State
1892	Millard	. German Bank of Millard
1890	Miller	Bank of Miller
1887	Miller	First Bank of
1914	Minden	Minden State
1919	Mitchell	. The American Bank
1892	Monroe	. Bank of Monroe
1904	Moorefield	Bank of Moorefield
1891	Morse Bluff	Bank of Morse Bluff
1900	Mullen	The Citizens State
1902	Murdock	. Bank of Murdock
1900	Murray	. Murray State
1884	Nebraska City	Farmers Bank
1888	Nehawka	The Nehawka Bank
1923	Neligh	. Antelope State
1910	Neligh	. Security State
1894	Nelson	. Commercial Bank
1901	Nemaha	Bank of Nemaha
1915	Nenzel	. Nenzel State
1909	Newman Grove	Farmers State
1916	Nickerson	. Farmers State
1913	Niobrara	State Bank of
1906	Nora	. Nora State
1909	Norden	. Bank of Norden
1913	Norfolk	. Nebraska State
1913	Norfolk	. Norfolk Savings
1920	Norfolk	. Security State
1906	Norman	Norman Exchange

Year chartered	Place of business	Name of bank
1878	North Platte	McDonald State
1919	North Platte	Union State
[fol. 22]		
1898	Oak	Scroggin & Co.
1909	Oakland	Oakland State
1909	Obert	Farmers State
1905	Oconto	Farmers State
1903	Oconto	Oconto State
1903	Odell	Hinds State
1907	Odell	State Bank of Odell
1906	Ogallala	Citizens Bank
1919	Ogallala	Farmers State
1904	Omaha	Bank of Florence
1907	Omaha (Benson)	Farmers & Merchants
1881	Omaha	So. Omaha Savings
1914	Omaha	So. Omaha State
1912	Omaha	State Bank of Omaha
1917	Omaha	Union State
1889	Ong	The Exchange Bank
1905	Orchard	Citizens State
1912	Ord	Nebraska State
1880	Ord	State Bank
1890	Orleans	Bank of Orleans
1903	Orleans	State Bank of
1921	Oshkosh	Nebraska State
1899	Osmond	Security State
1890	Otoe	Bank of Otoe
1914	Overton	Farmers State
1904	Oxford	Bank of Oxford
1892	Oxford	Security State
1916	Palisade	Palisade State
1891	Palmyra	Bank of Palmyra
1880	Papillion	Banking House of A. W. Clarke
[fol. 23]		
1905	Pauline	Pauline State
1874	Pawnee City	Farmers State
1919	Pender	Farmers & Merchants State
1915	Pender	Pender State

Year chartered	Place of business	Name of bank
1891	Peru	Citizens State
1921	Petersburg	Petersburg State
1884	Phillips	Bank of Phillips
1904	Pickrell	Farmers State
1914	Pierce	Citizens State
1882	Pierce	Cones State
1901	Pilger	Farmers State
1924	Pilger	Pilger State
1910	Platte Center	Farmers State
1899	Platte Center	Platte County Bank
1917	Plattsmouth	Farmers State
1904	Plattsmouth	Plattsmouth State
1902	Pleasantdale	First State
1892	Pleasanton	Pleasanton State
1907	Polk	Bank of Polk
1919	Polk	Citizens State
1881	Ponca	Bank of Dixon County
1917	Ponca	Farmers State
1905	Poole	State Bank of Poole
1907	Potter	Potter State
1906	Prague	Bank of Prague
1886	Prague	Farmers & Merchants
1905	Prairie Home	Farmers Bank
1916	Princeton	Princeton State
1904	Prosser	Prosser State
1887	Ragan	Bank of Ragan

[fol. 24]

1917	Randolph	Farmers & Merchants State
1919	Ravenna	Security State
7890	Ravenna	State Bank of
1900	Raymond	Bank of Raymond
1892	Red Cloud	State Bank of
1903	Republican City	Commercial State
1906	Richland	Richland State
1904	Rising City	Farmers State
1882	Rising City	Rising City Bank
1907	Riverdale	State Bank of
1899	Riverton	Riverton State

Year chartered	Place of business	Name of bank
1919	Rockville	Farmers State
1905	Rockville	Rockville State
1904	Rogers	Bank of Rogers
1906	Rosalie	Rosalie State
1904	Roseland	Roseland State
1891	Rulo	Bank of Rulo
1908	Rushville	Union Bank
1884	Salem	Bank of Salem
1917	Sarben	Sarben State
1910	Sargent	Farmers State
1883	Sargent	Sargent State
1891	Saronville	Farmers State
1887	Schuyler	Banking House of Folda
1902	Scotia	Bank of Scotia
1915	Scottsbluff	Platte Valley State
1918	Scribner	Farmers State
1872	Seward	State Bk. of Nebr.
1909	Shelby	Shelby State
1908	Shubert	Citizens Bank

[fol. 25]

1895	Shubert	Farmers State
1925	Sidney	American Bank of
1919	Sidney	Liberty State Bank
1913	Silver Creek	Farmers State Bank
1905	Smithfield	Farmers State Bank
1907	Snyder	Farmers & Merchants
1920	South Sioux City	Nebraska State
1901	Spalding	Security State
1922	Spencer	Spencer State
1908	Springfield	American State
1900	Springview	Stockmans Bank
1916	St. Edward	First State
1910	St. Libory.	St. Libory State
1888	St. Paul.	Citizens State
1879	St. Paul	St. Paul State
1908	St. Mary	Citizens State
1890	Stamford	Stamford Bank
1913	Stanton	Elkhorn Valley State

Year chartered	Place of business	Name of bank
1915	Staplehurst	Farmers State
1900	Stapleton	Bank of Stapleton
1901	Stapleton	Farmers State
1901	Steele City	Farmers State
1888	Steinauer	Bank of Steinauer
1916	Stella	Farmers State
1886	Stella	The State Bank
1902	Sterling	First State
1917	Stoddard	Farmers State
1887	Stratton	Commercial Banking Co.
1926	Stratton	St. Bk. of Stratton
1919	Stromsburg	Farmers State

[fol. 26]

1882	Stromsburg	Stromsburg Bank
1924	Sumol	Farmers State
1900	Surprise	St. Bk. of Surprise
1912	Sutherland	American State
1910	Sutherland	Farmers State
1894	Swanton	Bank of Swanton
1907	Swedeburg	St. Bk. of Swedeburg
1883	Syracuse	Bank of Syracuse
1884	Table Rock	St. Bk. of Table Rock
1884	Talmage	Bank of Talmage
1912	Talmage	Farmers State
1902	Tecumseh	Farmers State
1909	Tecumseh	First State
1892	Tecumseh	Tecumseh State
1892	Tekamah	Burt County State
1905	Tekamah	Farmers State
1919	Thayer	Farmers State
1897	Tobias	Citizens State
1912	Tobias	Tobias State
1918	Trenton	Citizens State
1917	Trenton	State Bank of
1905	Trumbull	Farmers Exchange
1910	Tryon	Tryon State
1905	Uehling	Farmers State
1906	Uehling	Logan Valley Bank
1928	Ulysses	Ulysses State
1908	Union	Bank of Union

Year chartered	Place of business	Name of bank
1908	University Place	Citizens State
1907	Upland	Peoples Bank
1883	Utica	Merchants Bank

[fol. 27]

1915	Valentine	Nebraska State
1915	Valley	Farmers State
1899	Valley	Valley State
1899	Valparaiso	Oak Creek Valley Bank
1919	Venango	Farmers State
1909	Venango	Venango State
1902	Verdigre	Knox Co. Bank
1911	Verdigre	Verdigre State
1898	Verdon	Verdon State
1901	Virginia	Citizens State
1904	Wabash	Farmers State
1891	Wahoo	Citizens State
1902	Wahoo	Nebr. State Savings
1918	Wallace	Farmers State
1919	Walton	Walton State
1905	Washington	Washington State
1901	Waterbury	Waterbury State
1924	Waterloo	State Bank of
1890	Wauneta	Wauneta Valley Bank
1925	Wausa	Commercial State
1892	Wayne	State Bank of Wayne
1890	Weeping Water	Nebr. State Bank
1888	Western	Saline County Bank
1909	Weston	Farmers & Merchants
1889	Weston	The Weston Bank
1899	West Point	Nebraska State
1912	Whitman	First State
1883	Willber	Saline State
1919	Willber	Willber State
1905	Wilcox	Exchange Bank

[fol. 28]

1917	Wilsonville	Home State
1898	Wilsonville	Wilsonville State
1922	Wineide	Citizens State

Year chartered	Place of business	Name of bank
1902	Winside	Merchants State
1906	Winslow	Winslow State
1913	Wisner	Wisner State
1886	Wood Lake	Wood Lake Bank
1920	Wood River	Farmers State
1910	Wymore	Farmers & Merchants
1906	Wynot	Farmers State
1905	York	American State
1895	Yutan	Bank of Yutan
1887	Beaver Crossing	State Bank of
1886	Benkelman	Bank of Benkelman
1902	Bladen	The Exchange Bank
1917	Bladen	Service State
1905	Bladen	State Bank of
1925	Cowles	The Cowles State
1907	Palmer	Loup Valley State
1886	Red Cloud	Peoples Bank
1909	Red Cloud	Webster County
1904	Rosemont	Bank of Rosemont
1907	Gordon	Gordon State

[File endorsement omitted.]

[fol. 20] In District Court of Lancaster County

[Title omitted]

Answer. Filed Jan. 14, 1929

Comes now Arthur J. Weaver, as Governor of the State of Nebraska, successor in office of Adam McMullen, Governor, and comes Clarence G. Bliss, as Secretary of the Department of Trade and Commerce and for answer to the petition of plaintiff filed in the above entitled cause say:

I

Defendants admit that the plaintiff is a corporation organized under the laws of the State of Nebraska as a bank and that it has been engaged in the banking business at the

village of Abie in the State of Nebraska for the past twenty-four years; admit that the defendant, Adam McMullen was the Governor of the State of Nebraska at the time this suit was filed, and allege that he has now been succeeded in office by Arthur J. Weaver, the duly elected, qualified and acting Governor; and admit that Clarence G. Bliss, is now the Secretary of the Department of Trade and Commerce of the State of Nebraska.

Defendants admit and aver that the Department of Trade and Commerce under the authority conferred upon it by Section 8028, Compiled Statutes of Nebraska for 1922 and related sections of the Banking Laws of Nebraska, as amended by Chapter 191, Session Laws of Nebraska for 1923, made a levy against each of the state banks of Nebraska of one fourth of one per cent of its average daily deposits for the year 1928. Admit that the defendant, [fol. 30] Clarence G. Bliss, as Secretary of the Department of Trade and Commerce has demanded of the plaintiff and of each of the other Nebraska State banks that it pay into the Depositors Guarantee Fund the amount so levied against it by not later than December 26, 1928; admit that several million dollars are now due Depositors in failed Nebraska state banks; and admit that the amount of money in the Guarantee Fund is much less than one per cent of the average daily deposits and much less than is required to pay the claims of depositors against failed banks; admit that they intend to and will enforce payment of said assessment; admit that one of the purposes and objects of said Guarantee Fund law was to protect depositors of state banks that might become insolvent; admit that there are National banks in Nebraska and who are not required to and do not pay assessments to the Guarantee Fund.

II

These defendants and each of them deny each and every other allegation in said petition contained not herein admitted.

III

Further answering said petition the defendants say that at the time said levy was made, the Depositors Guarantee

Fund was reduced to an amount very much less than one per cent of the average daily deposits as shown by the last semi-annual statements thereof filed; that it was necessary to make such levy in order to pay depositors who have valid claims outstanding against failed state banks and adjudicated as payable by the District Courts of said state and ordered paid from the Depositors Guarantee Fund; that the District Courts of Nebraska and the judges thereof have allowed claims for deposits of failed banks in receivership and adjudged the amount required to supply the deficiency in cash in said banks in the sum of several million dollars, and the same are unpaid, and has been certified to the Department of Trade and Commerce, and is a proper charge and claim against the Depositors Guarantee Fund, [fol. 31] and drafts have been drawn therefor, and there is no money therein to pay the same; the said levy is necessary, and all statutory prerequisites thereto have been had and done.

That included in said claims are claims of the state of Nebraska adjudicated as such in large sums against the Depositors Guarantee Fund as aforesaid and ordered paid therefrom on its deposits heretofore made in more than thirty of such failed state banks; and the municipal subdivisions and corporations of the state likewise have adjudicated claims on deposits in failed State Banks in a large amount; and the State of Nebraska and many of its corporate subdivisions have deposits of large sums in banks being operated by the Guarantee Fund Commission.

IV

Further answering said petition the defendants say:

That the Legislature of the State of Nebraska, for the year 1909, duly enacted "An Act for the Regulation, Supervision and Control of the Business of Banking, and Providing Penalties for its Violation, etc.", being Chapter 10, Page 66, Laws of Nebraska, 1909; and the same was duly approved, and ever since the year 1909 has been in full force and effect, and as subsequently amended and added to by the Legislature of 1911, Chapter 8, Laws of Nebraska, 1911, and by the Legislature of 1923, Chapter 191, Laws of Nebraska, 1923, Amendatory, and creating the Guarantee

Fund Commission. That said Act of 1909 as amended in 1911 is Section 7082 to 8061, The Compiled Statutes of Nebraska, 1922. That said enactments will be hereinafter referred to as the Guarantee Fund Law.

That ever since its passage in 1909 and amendment in 1911, said Guarantee Fund Law has contained a provision which authorized the levy of special assessments whenever the Depositors Guarantee Fund was so depleted subsequent to July 1, 1910, as to be less than one per cent of the average [fol. 32] daily deposits as shown by the last semi-annual statement, and when required for the immediate payment of depositors. That as enacted in 1909, it provided for special assessments based on the average daily deposits of all state banks in an amount not exceeding one per cent in any one year; that by amendment in the year 1925, said maximum levy was reduced to an amount not exceeding one half of one per cent in any one year, based on said average daily deposits. That the only change in said law during said period with respect to the amount of said special assessments has been by way of reducing said maximum special assessment one half.

That continuously during the period of approximately twenty years since the enactment of said law, the plaintiff and all of the other state banks in existence at the time of its enactment and the large number of state banks which have organized since have been organized thereunder, have continuously operated thereunder, have continually applied for licenses and have been granted and received licenses thereunder, have availed themselves of the benefits and privileges of said law, have expressly accepted and acquiesced in and ratified its terms, and said law has at all times been a part of the Articles of Incorporation and of the Charter of plaintiff and all other state banks and each of them.

That the plaintiff, and all the other state banks, and each of them, for the period aforesaid, have continuously accepted the benefits of said act, and especially the Guarantee Fund provisions thereof, and the plaintiff and each and all of said other banks have continuously represented and stated to the people of the state and especially to all of

terms and provisions of said Guarantee Fund Law, and the plaintiff and said banks have each and all continuously [fol. 33] since 1909 (and from their organization where organized since) given such statements and representations large publicity in their respective communities and throughout the state, by newspaper advertisements, printed recitals on the stationery of the respective banks, personal solicitation and argument, by circularization of the public and by signs on the interior and the exterior of the banks of said state generally; and the plaintiff and each and all of said banks have individually and collectively continuously through the years thereto and otherwise represented and stated to the depositing public and people of said state that their deposits were "Protected by the Depositors Guarantee Fund of the State of Nebraska". That typical of some of said publicity is the resolution passed by representatives of said banks, and given much publicity, in Omaha, in 1926, as follows:

"We reaffirm our strict adherence to the Guarantee Fund Law, under which no depositor in any Nebraska Bank has suffered loss. We are opposed to any change in the law which will in any way tend to obstruct, hinder or delay any depositor in Nebraska."

the United States District Court of Nebraska, above referred to, was brought by the plaintiffs in 1909 for themselves and on behalf of all state banks similarly situated and that the Abie State Bank, plaintiff herein, was one of those on whose behalf the suit was brought and said bank was organized and doing business in the State of Nebraska at the time that said suit was brought as a State bank, and the said case involves the same subject matter as the case at bar and is between the same parties and relates to the same subject matter and was brought to test the constitutionality of the same law and the section of the same law involved in this case, and said suit was brought on behalf of such state banks named in Schedule "A", attached to plaintiff's petition as were organized and doing business at the time that said suit was instituted in the United States District Court of Nebraska; that the plaintiff and said banks named in said schedule "A" above referred to were parties to said suit; that said case was carried to the Supreme Court of the United States and the law which the plaintiff now seeks to have adjudged unconstitutional was in said case adjudged to be constitutional by the Supreme Court of the United States on the 4th day of January, 1911.

That the decision of the Supreme Court of the United States holding the act to be constitutional, which the plaintiff in this action is now seeking to have declared unconstitutional, is res adjudicata as to the constitutionality of said act and the plaintiff, and all the other banks listed in Schedule "A" attached to and forming a part of plaintiff's petition was estopped by the said judgment of the Supreme Court of the United States holding said act to be constitutional, and are barred from asserting in this court or any other court that said act or any part thereof, [fol. 35] including among other parts that part which provides for the levy of a special assessment against the capital stock of state banks based upon their average daily deposits, is unconstitutional, each and every issue in the case at bar having been and was adjudicated in said former action.

That in the year 1923, the plaintiff and all of the banks in Nebraska acting in co-operation caused the Legislature of Nebraska to pass the act, Chapter 191, Laws of Nebraska,

'1923, hereinbefore referred to, amending said Guarantee Fund Law by reducing the amount of said special assessment and creating a Bankers Conservation Fund and an Administration Fund and the Guarantee Fund Commission, the members of which Commission thereunder are selected from names chosen by the state banks of Nebraska, and ever since the passage of this act, the plaintiff and each and all of the state banks of Nebraska have acted in cooperation in the carrying out of the terms thereof, have exercised the privileges thereunder conferred upon them, and have especially actively participated in the administration and observance of the Guarantee Fund Law.

That said Guarantee Fund Law for more than fifteen years has contained the provision:

"That no bank which has complied in full with the provisions of this Act shall be required to give any further security or bond for the purpose of becoming a depository for any public funds, but depository funds shall be secured in the same manner that private funds are secured."

That each and all of the state banks of Nebraska have continuously for more than fifteen years last past claimed and exercised the privileges in said provisions contained and demanded and received public funds from the state [fol. 36] and its subdivisions, and public officers, and now have such deposits and funds of the State of Nebraska and other municipal subdivisions received thereunder and without giving bond therefor; and all of the deposits of public money in this answer referred to were demanded by said banks and received under the provisions of said Guarantee Fund Law and without bonds. That recently a few public officials have requested bonds of state banks but such requests have been occasioned by the acts of the banks themselves in initiating this suit and now questioning the validity of said Guarantee Fund Law.

That from the year 1911 to 1923 said Guarantee Fund Law provided that no banking corporation transacting a banking business thereunder should pay interest on deposits directly or indirectly at a greater rate than five per cent per annum. That on the initiative of and at the solicitation of the said state banks of Nebraska, the Legislature of Nebraska of 1923 amended said provision to read

four per cent interest instead of five per cent, thereby reducing by one per cent the maximum interest that might be obtained by depositors on private and public funds from such banks as were willing to pay through competition or otherwise. That thereby the net earnings of said banks were materially increased; and since 1923 said banks have taken and enjoyed the benefits thereof. That one of the material reasons then stated and urged by the said banks to the public and the Legislature of Nebraska to induce the passage of said amendment were the protection and guarantee features of said law, and the obligation and liability of all banks to all depositors, and the assessments authorized and being paid and to be paid by said state banks thereunder. That as a result of said amendment and their acceptance of reduced interest rates, the depositors in state banks have materially contributed to said Guarantee Fund. [fol. 37] That the plaintiff and said banks through the years aforesaid and ever since the passage of said act in 1909 have in the foregoing and divers other ways continuously induced the people of said state, as well as public officials and corporations, both private and municipal, and especially those having moneys to deposit in banks, to believe that the deposits in each and all of the state banks of said state were governed by and protected by said Guarantee Fund Law, that its validity had been adjudicated by the Supreme Court of the United States and that each and all of said banks were subject to assessment and would be assessed under the provisions thereof for any sums becoming due to any depositor of any of said banks, under the provisions of said law, until said deposits were fully paid by said banks, and that they would pay any and all of said deposits and assessments, and they led and induced the people of said state and corporations both private and public and said depositors especially among them to believe all of their said statements and representations and each of them, in this answer set forth.

That the people of the state and corporations both private and public and especially the depositors referred to, relied on said acts and representations and believed the same to be true; that said acts were done and said representations were made with the purpose and intent on the part of said banks and each of them, (including plaintiff)

that they should be relied on by persons and corporations having money to deposit and relying thereon the people of the state and especially the depositors herein mentioned have deposited large sums of private and public moneys in the state banks of Nebraska, where the same now are, and especially have deposited the moneys now in failed banks and which have been adjudicated as claims and are unpaid, as hereinbefore recited.

[fol. 38] That by reason of said representations and acts of the said banks the deposits in said banks have been caused to and have trebled in amount since the year 1909. That in 1909, at the time of the enactment of the Guarantee Fund Law, there were 659 state banks, with a capital of $12,000,000.00 and deposits of $71,000,000.00; and in 1928, 739 state banks with a capital of $19,000,000.00 and deposits of $268,000,000.00.

That by reason of and on account of said representations and acts, each and all of the state banks of Nebraska largely increased in each year their earnings, and have acquired and now hold large properties and property rights created by said law, and obtained by reason thereof.

That said banks and the stockholders thereof have generally made and received, through said approximately twenty-year period, large profits and earnings, and the said net earnings of said banks over and above the Guarantee Fund assessments and operating expenses and losses, have generally exceeded in amount the capital stock of said respective banks; and the banking condition in Nebraska by reason of said Guarantee Fund Law has been stabilized, and said banking business rendered highly profitable; and the earnings of the state banks of Nebraska and the average earnings thereof are and have been in amount sufficient to pay all operating expenses and the maximum statutory Guarantee Fund assessment, and a fair return upon the capital investment, and said condition has prevailed ever since the enactment of said law in 1909, and will apparently continue to prevail. That the maximum amount of assessment that can be levied in any one year can not exceed six-tenths of one per cent, to-wit: $600 per $100,000 of average daily deposits, and an assessment at said rate takes less than one-tenth of the earnings of the respective banks of said state in any one year.

[fol. 39] That such bank failures as have occurred in the state of Nebraska have been by reason of causes other than and entirely independent of the Bank Guarantee Law, and have not been influenced in any degree by the assessment paid by any bank thereunder; but rather has the number and extent of bank failures been reduced by the existence and operation of said law.

The *the* following banks are among those listed in Exhibit A attached to plaintiff's petition, and are fairly representative of all portions of the state and the banks thereof and were nearly all organized since the enactment of the Guarantee Fund Law; the following schedule shows the name and location of each of said banks, the year of organization, the capital and surplus, the net earnings since organization after deducting all operating expenses, and the net earnings for the last full year ending June 30, 1928, after making similar deductions, each as shown by their reports. In practically all instances surplus has been acquired from earnings

Name of bank	Year organ.	Capital & surplus	Net profits since organization	Net profits 12 months end June 30 1928
Farmers State, Albion	1919	Cap. $50,000 Sur. 20,000	$47,660 60	$8,708 42
Farmers & Mer., Ashland	1883	Cap. 75,000 Sur. 25,000	Not available	9,175 41
Nebr. State, Broken Bow	1917	Cap. 35,000 Sur. 5,600	Not available	4,578 65
Harbine Bank, Fairbury	1873	Cap. 100,000 Sur. 25,000	555,990 22	21,402 19
Fremont State, Fremont	1904	Cap. 75,000 Sur. 37,500	108,761 49	7,608 76
Nebr. State, Grand Island	1917	Cap. 75,000 Sur. 35,000	110,672 63	32,408 94
State Bank, Hastings	1918	Cap. 75,000 Sur. 12,500	33,884 38	11,718 75
[fol. 40] American State, Kearney	1917	Cap. 50,000 Sur. 5,229	3,735 61	3,228 81
American State, Kimball	1917	Cap. 100,000 Sur. 15,000	Not available	10,997 78
Continental St., Lincoln	1909	Cap. 100,000 Sur. 100,000	337,675 76	58,676 07
State Bank, Madison	1918	Cap. 30,000	8,135 00	2,135 00

Name of bank	Year				
F. & M. State, McCook	1920	Sur.			
Nebraska State, Norfolk	1913	Sur.			
Union State, North Platte	1919	Sur.			
Union State, Omaha	1917	Sur.	Note		
Nebraska State, Ord	1912	Sur.			
Cit. State, Pierce	1914	Sur.			
Princeton State, Princeton	1916	Sur.			
Platte Valley St., Scottsbluff	1909	Sur.			
Nebr. State, Valentine	1915	Sur.			

The State Bank of Omaha, Nebraska, organized in 1912, and operating under the Guarantee Fund Law since its organization had grown to $7,019,030 deposits Sept. 20, 1928, and is paying dividends at the rate of 10% per annum to its stockholders on its capital stock and has accumulated undivided profits in a large amount.

The plaintiff, Abie State Bank organized in September, 1904, with a paid in capital of $15,000 earned net profits of $20,105 up to June 30, 1927, and declared dividends of $17,400 therefrom and added $2,500 to surplus account.

[fol. 41] Each of the deposits of moneys in failed Nebraska state banks in receivership herein referred to as adjudicated claims and ordered paid from the Guaranty Fund, and all of which are now unpaid, and which aggregate several millions of dollars, were thus adjudicated and ordered paid from and become a fixed and final charge against and liability of said Guaranty Fund since May 1, 1927, and prior to the institution of this suit; that said deposits were made in said banks while the same were in regular operation by many thousands of persons, corporations, co partnerships and officials of Nebraska cities, villages, townships, school districts and other bodies, and the Treasurer of the State of Nebraska, and by which depositors respectively said deposits and claims thereon are now owned; that deposits of Nebraska public moneys in failed state banks and adjudicated claims thereon aggregate more than $960,828.47.

That substantially one half of all of said deposits heretofore made in now failed banks in number and amount were made on certificates of deposit, and for which the banks respectively issued written certificates of deposit—the promise of the bank to repay. That said failed receivership banks are about sixty-four in number. That said deposits and each of them were induced by the acts and representations of the receiving banks and all the other state banks of Nebraska in the manner herein referred to, and were made under the Guaranty Fund Law.

That at the *the* time said respective deposits were made in said banks the banks named in "Exhibit A" attached to Plaintiff's petition and all the other state banks of Nebraska, knew of all the acts and representations of said

receiving banks and other banks in procuring and receiving said deposits upon the representation aforesaid and that each and all of the state banks of the State of Nebraska [fol. 42] were liable for the Guaranty Fund assessments both general and special and that all of said banks agreed to abide by said law and pay said assessments, and all of said banks acquiesced therein and approved the same, and offered no protest or objection to the making of said representations and to the deposit of said monies.

That further at the time of the making of said deposits and each of them and to induce the making thereof, said state banks of Nebraska agreed with said respective depositors that the deposit and the repayment thereof was "Protected by the Depositors Guarantee Fund of the State of Nebraska," and was guaranteed thereby and guaranteed by all of said state banks, and that in the event of default in payment by said receiving banks and said deposit being adjudicated a claim against and ordered paid from said Guarantee Fund, that they would pay the general and special assessments provided by said Guarantee Fund Law and to the extent necessary to pay said deposits and pay said deposits. That in the case of deposits evidenced by certificates of deposit, said banks endorsed thereon as a part thereof and as further evidencing said agreement the words "Protected by the Depositors Guarantee Fund of the State of Nebraska."

That as to the state banks taken over and now being operated by the Guarantee Fund Commission and the deposits therein, the facts are identical, except that the claims have not yet been adjudicated and ordered paid. That said depositors are many thousand and the net present liability thus guaranteed and agreed to be paid as aforesaid aggregate several millions of dollars. That during all the times aforesaid all of the state banks of Nebraska had and were governed by an identical agreement as to the deposits of each other, and which was a part of the same agreement; [fol. 43] and all received deposits and all issued certificates of deposit in manner and character aforesaid, and as a part of the same plan and agreement.

That each of said depositors in now failed banks aforesaid and the other depositors in banks now operated by the Guarantee Fund Commission, each relied on the aforesaid

referred to acts, representations and agreements of said banks, and relying thereon made said deposits, while the banks were in regular operation and would not have made the same except therefor.

That said depositors in now failed banks and claimants therein number many thousand and said depositors in banks now being operated by the Commission aggregate many thousand and all aggregate more than fifty thousand, and it is impracticable for them or any substantial number to individually intervene and defend this suit; that these defendants make and file this answer also for and on behalf of said depositors and claimants and each of them, and particularly does Arthur J. Weaver as Governor of the State of Nebraska also make and file this answer for and on behalf of the public officials of the State of Nebraska, and the municipal and other public corporations of the state, depositors and claimants aforesaid.

That the amount of said public moneys on deposit in receivership banks and Commission banks respectively are substantially as follows:

1. County Treasurer Accounts:		
Commission Operated Banks	$634,676.16	
Receiverships	562,240.68	$1,196,916.84
2. State Treasurer:		
Commission Operated Banks	$54,840.00	
Receiverships	106,178.92	161,018.92
3. City or Village Treasurers:		
Commission Operated Banks	$128,583.30	
Receiverships	126,232.37	254,815.67
[fol. 44] 4. Township Treasurers:		
Commission Operated Banks	[redacted]12,440.04	
Receiverships	11,653.87	24,093.91
5. School District Treasurers:		
Commission Operated Banks	$162,324.73	
Receiverships	106,305.34	268,630.07
6. Other Public Funds:		
Commission Operated Banks	$51,535.64	
Receiverships	48,217.29	99,752.94
Total		$2,005,228.35

That said Guarantee Fund acts of the Nebraska Legislature and all amendments thereto are valid and constitutional; and have been universally and continuously recognized as such for more than seventeen years (the amendments since their enactment), and particularly by all the state banks of Nebraska and all others affected thereby.

That the plaintiff and all other state banks in Nebraska are and have been engaged in a quasi public business and are subject to the absolute control and regulation of the state and its duly constituted officials.

That the depositors and claimants in failed receivership banks and incommissionoperated state banks in this answer referred to have unsecured claims, and the same are due, the cash in the hands of each receiver is insufficient to pay claims in such banks, and the courts and judges thereof have determined an amount to be necessary in each bank to pay said deficieney in the aggregate sum of several million dollars, and the same was prior to the institution of this suit certified in each case to the Department of Trade and Commerce and said department drew against the Depositors Guarantee Fund in said amounts to supply the said deficieney, and there were and are no funds therein; and the assessment complained of was made to supply funds.

[fol. 45] That several million of liability to depositors in failed banks has now accrued, and are a charge and liability against said Guarantee Fund, each as hereinbefore recited. That there are several million of net liability to depositors from other banks in the hands of the Commission that will mature as claims against said Guarantee Fund; but which claims are not yet adjudicated; that the aggregate number of depositors in said banks in receivership with adjudicated claims and in the hands of the Guarantee Fund Commissions is fifty thousand. That included therein are State, County, school district, municipal, and other public funds.

That the plaintiff and each and all of the other State banks of Nebraska have at all times represented and stated that the provisions for a special assessment as contained in Section 47 of said original act, and as thereafter amended, provided a special assessment against said banks, and each of them, and continuously for approximately twenty years construed, represented, treated and held out said Section as provided for special assessment against said banks and each of them, and the words "special assessment against the capital stock" as being synonomous with and meaning assessment against said banks; and all of the many special assessments since the enactment of said law have been assessed against the banks and been paid by them.

That each and all of the deposits in said banks adjudicated as claims against the Guarantee Fund, and those not adjudicated, were made by said respective depositors as hereinbefore recited, and induced by said Guarantee Fund Law and the acts and representations of the plaintiff and the other banks as hereinbefore recited, and in the manner in detail as hereinbefore recited; that said depositors and each of them have a vested right to the payment of the respective amounts thereout of the Guarantee Fund of the State of Nebraska, and vested right of payment as against [fol. 9] the plaintiffs and all of the State Banks and each of them and against said Fund, and a vested right to the continuance of said regular and special assessment annually hereafter for the payment thereof, so far as the funds derived by said regular and special assessment will extend.

The plaintiff and other state banks have stood by and permitted and have actively induced the depositors to deposit their moneys under said Guarantee Fund Law and the Guarantee Fund to become indebted to depositors as hereinbefore recited, and have been guilty of gross laches in standing by without denial of their liability or the validity of law while the depositors aforesaid entrusted their funds to the said state banks in reliance upon the protection of said guarantee Fund, and their acts as aforesaid, and in failing to assert such denial of liability and alleged invalidity of said law during the period aforesaid.

That by reason of the representations and statements and acts and laches of the plaintiff and of each and all the other state banks named in "exhibit A" of plaintiff's petition, and which have been participated in by all of the other state banks of the state, and of the facts herein set forth the plaintiff, and each and all of the banking corporations listed in "Exhibit A", and all other state banks, are estopped:

To question or assert the invalidity or unconstitutionality of the law under which they are acting; to question or assert the invalidity or unconstitutionality of the Guarantee Fund Law; to question or assert the reasonableness of any assessment authorized thereby levied thereunder; to question or deny liability to pay assessments levied in the manner and to the extent provided by said guarantee Fund Law; to make or assert the alleged claims or any of the

alleged claims, set forth in their petition filed herein; to maintain this suit.

Wherefore, the defendants pray that the issuance of temporary injunction be denied, and that issuance of per-
[fol. 47] manent injunction be denied, and that plaintiff's suit against them may be dismissed at plaintiff's costs and that they may have such other and further relief as may be just and equitable.

C. A. Sorensen, Attorney General; Geo. W. Ayres, Assistant Attorney General; Charles E. Abbott, Edgar Fernean, Special Assistants, Attorneys for Defendants.

Duly sworn to by Clarence G. Bliss. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 48] In District Court of Lancaster County

[Title omitted]

Reply—Filed Jan. 23, 1929

Comes now the plaintiff and, for itself and for the other banks named in the petition, admits that Arthur J. Weaver is now the Governor of the State of Nebraska and the successor in office of the defendant, Adam McMullen; and the plaintiff denies each and every other allegation of new matter in said answer contained, and which allegations and averments of fact are not set forth in the plaintiff's petition.

Abie State Bank, Plaintiff, by Gaines, McGilton, Van Orsdel & Gaines, Courtright, Sidner & Gunderson, Hainer, Flansburg & Lee, Its Attorneys.

Duly sworn to by Leonard A. Flansburg. Jurat omitted in printing.

[fol. 49] [File endorsement omitted.]

[fol. 50] In District Court of Lancaster County

101-202

Abie State Bank, Abie, Nebraska, Plaintiff,

vs.

Arthur J. Weaver, as Governor of the State of Nebraska, and Clarence G. Bliss, as Secretary of the Department of of Trade and Commerce, Defendants

Decree—April 24, 1929

Now on this 24th day of April, 1929, this cause having heretofore come on for trial, the parties having appeared, evidence having been adduced, the cause having been fully tried and submitted to the court, and the court now being fully advised in the premises upon all of the issues presented by the plaintiff's petition, the answers of the defendants, and the answers and cross-petition of the intervenors, and answers thereto, and upon all of the pleadings finds generally upon each and all of such issues in favor of the plaintiff and against the defendants, and in favor of the plaintiffs and against the said intervenors.

The court further finds that the special assessment levied against the plaintiff banks under the provisions of Section 8028 Compiled Statutes 1922, which levy was made on December 15, 1928, and which the defendants were taking steps to collect, and that each of the special assessments provided for by said section of the statutes, is, under the facts and conditions shown by the evidence in this case, unjust, oppressive, unreasonable in amount and confiscatory of the earnings and property of the plaintiff bank and of the banks in behalf of whom this suit is brought, as is more particularly shown by the facts, conditions, findings and conclusions set forth in the memorandum opinion filed herein.

[fol. 51] The court further finds, as is more particularly set forth in said memorandum opinion, that owing to the condition of the Guaranty Fund and the fact that there is a deficit in said fund of near $16,000,000.00, that the depositors in existing banks, and the existing and operating banks themselves, now receive no benefit from the payment

of such assessments, but that the payment of such assessments must be used to pay, and will be insufficient to meet, the said deficit which now exists in said Guaranty Fund, and that the burden of paying such assessments by the state banks, instead of strengthening the state banking system and protecting depositors of state banks, has just the contrary effect, and, to the extent of the burden imposed by such assessments, makes said banks less able to meet the demands of their current depositors and less able to keep their banks solvent; that the said special assessment is not now being levied for any public purpose, but is being levied for the sole and only purpose of paying claims of depositors in failed banks, which claims have been allowed, and will not and cannot be used for the purpose of creating a fund for the stabilizing of banking conditions in the State of Nebraska.

The court further finds that the levy and collection of such special assessments, including the assessment specifically complained of in the plaintiff's petition, is unreasonable, unjust, oppressive and confiscatory and not, under present conditions, a proper exercise of nor justified by the police power of the state, and that the provision of Section 8028 Compiled Statutes 1922, providing for such special assessments, is, under the facts and conditions shown to exist in this case, unreasonable, unjust, oppressive and confiscatory and void and unconstitutional, and in violation of the 5th Amendment of the Constitution of the United States and of the 14th Amendment of the Constitution of the United [fol. 52] States, in that it deprives the plaintiff, Abie State Bank, and the state banks on behalf of whom this suit is brought, of their property without due process of law, and denies them the equal protection of the law, and further, that the provisions of said law are in violation of Section 3, of Article I, of the Constitution of the State of Nebraska, in that said section and provision for special assessments deprives the said plaintiff banks of their property without due process of law.

The court further finds that the plaintiff is entitled to an injunction as prayed.

Wherefore, it is considered, ordered, adjudged and decreed that the injunctive order heretofore issued shall be made permanent and the said defendants, and each of them,

be and the same hereby are enjoined from collecting or taking any further steps to collect the said special assessment levied on December 15, 1928, under the provisions of said Section 8028 Compiled Statutes 1922, and all other and subsequent special assessments under the provisions of said law. This order, however being without prejudice to the right of the defendants to apply for a vacation of this injunction should at some future time the conditions so change that such special assessments can be paid by the state banks, and at the same time said banks receive in addition compensatory returns upon their investment.

It is further ordered, adjudged and decreed that the plaintiffs do have and recover from the defendants their costs herein expended, and that the defendants be adjudged to pay all the costs of this action, except the costs made by the intervenors.

It is further ordered, adjudged and decreed that the cross-petitions of the intervenors be and the same are hereby dismissed and the intervenors are ordered and adjudged to pay their own costs.

Lincoln Frost, Judge of the District Court.

[fol. 53] In District Court of Lancaster County

Abie State Bank, Abie, Nebraska, Plaintiff,

vs.

Arthur J. Weaver, as Governor of the State of Nebraska, and Clarence G. Bliss, as Secretary of the Department of Trade and Commerce, Defendants

Memorandum Opinion—Filed April 24, 1929

In this opinion I shall discuss but three general propositions, to wit:

1. Are the special assessments levied under the Guaranty Fund Law, under the present condition of the banks, confiscatory?

2. If they are confiscatory have the banks, in view of the fact that they have accepted and acted under the provisions

of the Guaranty Fund Law, including that levying the special assessments, waived their right to plead the confiscatory character of the law and hence, so far as relates to the section authorizing the levy of special assessments, its unconstitutionality?

3. Even though the banks have waived that right, are the needs of commerce such as to supercede the rights of the individual banks to the extent that public policy in the interest of public welfare denies them the right to waive the unconstitutionality of the law?

[fol. 54] There will be no attempt to burden this opinion with extensive citations of authorities. I have had to help of elaborate briefs and all propositions of law have been carefully analyzed therein, many authorities cited, and I desire to express my appreciation for the assistance of the attorneys. The case is one of great public interest and may have much to do with the future of the state banking system. The responsibility, however, is less overwhelming when one recalls that doubtless a higher court will have an opportunity to correct any errors committed by this Court.

It is quite unfortunate that the Guaranty Fund Law has been before the Court at the same time that it was pending in the Legislature. Public discussion of propositions involved in a law suit are supposed to cease while the case is going through the Court. The public's turn comes after the decision, when it is open to any legitimate criticism. However, in view of the fact of the legislation pending the Court was powerless to enforce the usual rule as to no public discussions.

I have fully recognized that the settlement of the future of the Depositors Guaranty Fund is an economic problem to the solved by the legislative branch. The courts can neither advise nor question what is done, except as some constitutional right guaranteed to the individual is violated. It is then the duty of the court to protect the individual in the enjoyment of those rights.

This is a suit brought by the Plaintiff in behalf of itself and 558 other state banks to enjoin the collection of the special assessment of three-tenths of 1 per cent of the average daily deposits of the state banks, levied December 15,

1928, and other future special assessments. The ground [fol. 55] upon which they claim the right to an injunction, among others, is that said special assessments are illegal, unjust and confiscatory and exceed eight per cent per annum on the entire capital stock of the state banks of Nebraska and exceed the net annual earnings of the state banks; that based upon the present status of the Depositors Guaranty Fund and the experience of state banking in Nebraska for the past eight years said special assessments, if required to be paid for a few years will deplete or wipe out the entire capital stock of the state banks. There are other grounds alleged but for the purpose of this opinion we shall discuss only the one mentioned. The Defendants and Intervenors deny that the disastrous effects claimed by the Plaintiffs will follow as a result of continuing the collection of the special assessments.

Are the Special Assessments, under the Present Condition of the Banks, Confiscatory?

The banks, to sustain their contention, presented three compilations, each covering consecutive six months' periods, commencing with January 1, 1927 and expiring June 30, 1928. For each period a list was made of all banks that earned during that period less than 6 per cent on their capital stock. There is a considerable shifting of banks in the three lists; however, 112 appear on all three. In other words, there were 112 state banks in Nebraska for the entire eighteen months' period whose earnings were less than 6 per cent. During the same eighteen months' period 375 state banks appeared on two of the lists. For the six months ending June 30, 1927, there were 413 banks making less than six per cent and these banks showed an aggregate loss of $205,540.14; for the six months ending December 31, 1927, there were 376 banks making less than six per [fol. 56] cent and these banks showed an aggregate loss of $195,004.07; and for the six months ending June 30, 1928 there were 353 banks making less than six per cent and these banks showed an aggregate loss of $306,076.18. The combined losses, therefore, of these banks for the entire eighteen months are $706,620.30. There are 60 less banks on the third list than there were on the first; this decrease is

more than accounted for by the bank failures during that period, there being 41 in 1927 and 57 in 1928.

The Defendants have prepared a more extensive table covering the same eighteen months which includes the 726 state banks that had survived on June 30, 1928. They have also prepared a recapitulation of this table. This recapitulation shows that 726 had a total capital and surplus of $24,958,557.62; had paid dividends during the eighteen months in the sum of $1,407,268.67; had charged off $2,233,968.40. Said recapitulation further shows 570 banks had net earnings of $2,494,318.94; while 156 banks had net deficits in earnings of $558,799.54. This, therefore, makes the total net earnings of both groups $1,935,519.40 or 7.9 per cent of the total capital and surplus.

These same banks paid assessments into the Depositors Guaranty Fund for the eighteen months' period of $2,412,324.78 which sum is $476,805.38 more than the total net earnings of said banks for the same period.

The banks' statistical expert has presented some figures drawn from a study of the Defendants' table. The significant thing in these figures is that compensatory net earnings are confined to a minority of the banks. Thus, 176 banks, or 24.24 per cent of the total number earned $1,475,056.50 which was 76.21 per cent of the total earnings of all banks. Hence, less than a fourth earned three-fourths of the [fol. 57] total earnings. On the other hand, 156 banks or 21.48 per cent of the total number showed a loss of $558,799.54 and 410 banks, or 56.47 per cent of the total number not only were earning less than six per cent per annum on their combined capital and surplus as of June 30, 1928, but also show their earnings in the red in the sum of $179,170.79.

The Department of Trade and Commerce prepared an analysis of operating expense and income of 845 state banks for the fiscal year ending June 30, 1926. This analysis classifies the banks according to capitalization which enables us to locate in a general way the banks with the least earnings; the two groups, one consisting of 206 banks with a capital of from ten to twenty thousand dollars showed a net profit on capital and surplus of 4.47 per cent, while 426 banks with a capital of from twenty to forty thousand dollars showed a net profit of 4.95 per cent. Thus both these classes show earnings of less than 5 per cent. On the

other hand, 177 banks with a capital of from forty to seventy-five thousand dollars earned 6.28 per cent; eighteen banks with a capital of seventy-five to a hundred thousand, 5.90 per cent, while another eighteen banks with a capital of from one hundred to two hundred thousand dollars earned 11.45 per cent. The net profits on capital and surplus for the entire 845 banks was 5.924 per cent. It is clear from this table that the smaller banks, which by law must be located in the smaller places, are the ones that are least able to meet the strenuous situation that is being experienced.

The Department of Trade and Commerce has issued another table giving a report based on the last call reports for the several years. This table shows that there were 1012 banks November 13, 1920, and that the number has been reduced to 726 on December 31, 1928. This reduc- [fol. 58] tion in banks is accounted for by failures, there being 4 banks taken over by the Department of Trade and Commerce in 1920; 25 in 1921; 21 in 1922; 24 in 1923; 19 in 1924; 38 in 1925; 36 in 1926; 41 in 1927 and 57 in 1928. For the years 1920 to 1928 inclusive the 618 banks had assessed their stockholders $2,106,682.15 and had charged off losses from sources other than assessments of stockholders $8,-347,948.40. During the same period these banks had paid dividends to their stockholders in the aggregate sum of $7,754,771.67. Under the heading "Other Real Estate Owned" the aggregate had increased from $818,514.10 in 1920 to $9,872,647.21 in 1928 while during the same period their capital stock had decreased from $26,349,700 to $19,-001,000; their surplus from $8,174,341.33 to $6,075,741.87 and their net undivided profits from $3,743,631.54 to $2,900,-014.22. An analysis of these figures leads to the conclusion that our state banking system has not brought prosperity to our banks. The lowered capital stock, surplus and undivided profits can partially be accounted for by the greatly reduced number of banks. However, that cannot explain the excessive amount of losses which had to be charged off or the great increase in the "Other Real Estate Owned"; the latter item clearly indicates that there is a large amount of additional assets that should be charged off. It is not a healthy condition to have more than one-third of the banks' capital invested in the frozen asset, "Other Real Estate". If the banks had not been required

to pay the special assessments they would have been able to charge off part or all of this "Other Real Estate".

The same report also shows the number of banks that were being operated by the Guaranty Fund Commission as going concerns during the years 1925, '26 and '27. These banks are not included in the figures given above. It appears therefrom that on December 31, 1927, the Commission [fol. 59] was operating 62 banks having an aggregate capital stock of $1,615,700, a surplus of $216,942.01 and a deficit in the net undivided profits of $1,673,699.17 and "Other Real Estate" of $2,366,971.50.

The figures I have already given deal with the banks as a whole. They plainly show that a majority of the banks are not receiving compensatory returns upon their investment, while a fourth are receiving rather extravagant profits.

What is Meant by "Confiscatory"

In order that the assessments levied shall be declared confiscatory it is not necessary to show the banks in the red; it is sufficient that they do not bring results commensurate with the capital invested. This question has been before the Supreme Court of the United States in connection with different public utilities and the Court has held that the rate established must be such as will bring returns equal to those of kindred organizations operated in the same general locality. The case of the Lincoln Gas and Electric Light Company vs. City of Lincoln will serve to illustrate the point. In that case the city council of Lincoln had fixed a rate to be charged by the gas company. That company sought an injunction, claiming that the rate fixed was confiscatory. The case found its way to the Supreme Court of the United States. The third paragraph of the syllabus succinctly expresses that Court's opinion upon this point:

"A gas rate fixed by municipal ordinance cannot be said necessarily to be free from the objection that it is confiscatory merely because it yields as much as 6 per cent upon the invested capital, where 8 per cent is the lowest rate sought and generally obtained as a return upon capital invested in banking, merchandising, and other business in

the vicinity, 7 per cent being the legal rate of interest in the state."

The Case of the Individual Bank

Let us look at this from the standpoint of an individual [fol. 60] bank. The Plaintiff, Abie State Bank, will serve as an illustration. This bank in the year 1928 had a profit of $333.05 upon a capital stock of $15,000 and surplus of $2,500 which is a 1.9 per cent return. The employees of the bank made commissions on the sale of real estate and by the sale of insurance amounting to $587.61 which went into the earnings of the company. Therefore, without those outside activities the bank would have been in the red $256.56. While it would have been in the red in any event had it paid the special assessment levied on December 15, 1928 by the state in the sum of $459.38. The net profits for this same bank for the year 1927, after charging off a worthless note of $1,000, were but $185.17. In 1926 the Abie State Bank's net profits were $1,245.61. $806.80 of this net profit was derived from commissions on sales of land and insurance. The banks paid a dividend this year but paid none in 1927 or '28. The testimony shows that it has $4,000 of its capital tied up in frozen assets. It is true that the bank had compensatory returns earlier in its history. However, in this suit we must be governed by present day conditions. The fact that they have made earnings in the past has no significance except as it indicates what the earnings may be in future. The condition of the banks on the day an assessment is levied is a fundamental factor to be considered along with that levy in determining whether a compensatory return will be received.

There Has Been a Period of Deflation

The testimony in this case has dealt at great length with the general financial conditions and how those conditions have affected the banking system. There is no doubt that we have had a period of deflation. This has been especially disastrous in the farming communities of the middle west. Value has gone out of securities and this has been particularly true of real estate mortgages. It would be

useless to deny that the deflation period following the war [fol. 61] and continuing up to this time has been one of the primary causes of the disaster which has overtaken the Nebraska banks. Another great cause is bad management. Human frailty is always present in any considerable group so we cannot place too much stress upon that point. One reason that the larger banks paid better returns is that better salaries attract more efficient managers for their institutions. However, many of the bank losses charged to bad management are caused by a shrinkage in the value of securities that could not, even with reasonable foresight, have been anticipated.

The assessments levied by law occupy a different position. Their continuation must be determined by the results which follow their collection. If the disaster which has befallen the state banks of Nebraska is, in a marked degree, due to the special assessments levied upon them, even though those assessments are but the last straw that breaks the camel's back, then they are a primary cause because they directly contribute to the disaster. The Legislature can relieve the banks of the burden of the special assessments but there is no legislation which can wipe out the results of the deflation.

From the figures furnished us by the Department of Trade and Commerce we learn that the total assessments levied upon the 726 banks for the year 1928 amounted to $1,508,360.36. This is almost exactly 8 per cent of the banks' capitalization, which was $19,001,000. However, this figure includes the regular assessment for 1928 of one-tenth of one per cent which amounts to $263,937.03. As this assessment is not involved in this suit it should be deducted. That leaves the special assessments aggregating $1,244,423.33 which is a little more than six per cent upon the capital of the banks.

[fol. 62] The Department of Trade and Commerce has furnished us another table which has already been referred to and is an analysis of the operating expenses and income of 845 state banks for the fiscal year ending June 30, 1926. This table shows that out of every dollar of the expenses of the banks as a whole 9.08 cents were contributed towards assessments to the Guaranty Fund. The

amount varies for the different classifications of the banks from 8.85 cents to 11.21 cents.

Dividends Paid

From Exhibit 37, which is the Defendants' compilation relating to 726 banks for eighteen months ending June 30, 1928, we learn something of the dividends paid. This Exhibit is based upon the figures relating to the banks that had survived and is practically the list today of the going banks. From this Exhibit we learn that only 273 banks, or 37.6 per cent of the total number, paid a dividend in 1928; that 124 paid their last dividend in 1927; 30 in 1926; 20 in 1925; 11 in 1924; 9 in 1923; 14 in 1922; 42 in 1921 and 43 in 1920; while 30 reported, paid no dividend since prior to 1920. These figures are somewhat incomplete because 130 do not state when their last dividend was paid. However, it is pretty safe to say that if they had paid any dividend recently they would have reported the fact. From the same exhibit we learn that the 726 banks included in that Exhibit reported the paying of dividends for the eighteen months amounting to $1,407,268.67. By taking two-thirds of this amount we get at the approximate amount paid for one year. This is 4.97 per cent on the capital stock of $18,875,500 and 3.44 per cent on the capital stock, surplus and undivided profits of $27,223,913 as given in the same Exhibit.

The Defendants contend that even though the evidence [fol. 63] should show that the banks as a whole are not receiving returns which are compensatory, still there has been no showing that individual banks cannot survive or make a reasonable return on their investment. It is true that the evidence in the case deals largely with generalizations based upon a study of all the banks. Perhaps the most favorable illustration for the defense would be the question of inefficient management. Before the Court could conclude as to the cause of the failure of an individual bank it would be quite important to know the character of its management. However, taking banks as a whole general information on the subject of banking would seem to be sufficient. It would seem, too, that the Guaranty

Fund Law depends for its success upon all banks doing their part under the terms of that law. If any appreciable number of banks are unable to do their part because of unreasonable burdens, then the system as a whole must fail. The evidence introduced in this case quite clearly demonstrates that fully two-thirds of the banks under the existing financial conditions are unable, after paying assessments amounting to 8 per cent on their capital, to pay compensatory dividends. The Guaranty Fund Law cannot continue to function except upon the basis of all going state banks meeting its demands. It is based upon mutuality, the cooperation of all. Such banks as cannot respond to those demands must fall by the wayside. How far can this process of elimination be carried without violating the constitutional guaranties against taking private property for private use without compensation?

Former Adjudication

After the Guaranty Fund Law was passed in 1909 a group of banks combined and filed suit questioning its constitutionality. That case went to the Supreme Court of the United States and was decided by that Court in January, [fol. 64] 1911. Suits were likewise instituted against the Guaranty Fund Laws of Oklahoma and Kansas and all three cases were argued before the Supreme Court together and later decided on the same day. The main opinion was written in the case involving the Oklahoma Law, entitled Noble State Bank vs. Haskell, et al. The Oklahoma and Nebraska statutes were very similar and the Court in the Nebraska case said: "This case is governed by the decision in the Noble State Bank vs. Haskell". The decisions were that the several Guaranty Fund Laws involved were constitutional. Therefore all questions that were heard and determined in that decision are not open for further consideration. However, such questions as were not involved in that hearing can be raised at this time. Was it there determined that the Guaranty Fund Assessments were not confiscatory? I see no discussion of that question in Justice Holmes' opinion. It was set up in the pleadings of the banks but was not determined by the Court. As a matter of fact, there was nothing presented upon

which to base a decision. The law was yet untried and its ultimate results could only be surmised. Indeed, the Nebraska Law, although passed in 1909, did not become effective until 1911 after the decision had been rendered in the Supreme Court. The confiscatory character of the law must be determined by considering the conditions existing at any given period. The fact that the returns were compensatory during one stage of a law's operation would not be conclusive on that question at a different period. Therefore, the question of whether the banks are receiving compensatory returns upon the investment is properly considered in this case. If they are not, as is evident from the review hertofore given, then it is necessary to determine to what extent the levying of the Guaranty Fund assessments are responsible therefor, a question which has already been discussed.

[fol. 65] Have the Banks Waived Their Right to Question the Constitutionality of the Guaranty Fund Law?

The Defendants contend that the banks, by accepting the Guaranty Fund Law and taking advantage of its provisions are estopped or have waived their right to question the constitutionality of that law. The banks, however, contend that they had no option and that they must accept the terms of the law or go out of business. The general holdings of the Courts are with the State upon this contention. Many of the banks were organized after the Guaranty Fund Law was in effect while others who continued operation under their former charter were required to accept the terms of the Guaranty Fund statute. They have been acting under it ever since the adjudication in the Supreme Court of the United States. The testimony shows that for years the state banks received increased deposits because of the believed security under the provisions of that law. One witness has testified that in his opinion their deposits had been increased one hundred million dollars because of the general belief in the security of deposits in state banks. We know the deposits in state banks increased two and one half times while the national banks increased only one and a half times. The banks, by advertisements and circulars, stressed the advantages of the Guaranty Fund Law.

Of course, these increased deposits which the banks secured in the end resulted in greater profits to them. The advertisements carried on by 334 banks in the Omaha Bee-News during 1926 were powerful appeals to the public in behalf of state banks and particularly in behalf of the advantages of depositing in those banks because of the Guaranty Fund Law. These advertisements were carried during the year 1926 as chapters under the title, "A Story No other State can Tell." Each advertisement was illustrated and dealt [fol. 66] with a different phase of the law. The different chapters were written by an expert in newspaper advertising. It is also true that by reason of the Guaranty Fund Law and its believed security the banks were relieved from giving bonds for public moneys deposited with them. This was quite a financial advantage to them. However, it is an advantage that has been withdrawn since January 1, 1929. I am of the opinion that the banks have waived the right to raise the constitutionality of the Depositors Guaranty Fund Law. They contend that when they were stressing the advantages of that law they did not know the actual conditions of the state banks. That undoubtedly was true. As late as May 17, 1927, the Secretary of the Guaranty Fund Commission made a statement to a committee of Bankers that on that date the loss occasioned from bank failures amounted to a little more than six million dollars, while at the same time the Secretary of the Department of Trade and Commerce reported that a study of the going banks showed that the future net loss would approximate $1,118,000. Under the strict terms governing estoppel lack of knowledge would probably be sufficient to relieve the banks. However, I doubt if it would under the law governing waiver already discussed. If it is true that the Defendants are required to show that each and every bank has waived its right to plead the unconstitutionality of the Guaranty Fund Law then there would be a considerable number against whom the estoppel or waiver could not be invoked. The advertisements in the Omaha Bee-News were the most sustained and extended effort to persuade the depositing public to use state banks. A similar effort was made on the part of the state banks of Dodge County in the Fremont Tribune. There was also considerable testimony showing the posting of the certificate issued by

[fol. 67] the Department of Trade and Commerce containing the statement that the "Deposits of this Bank are Protected by the Depositors Guaranty Fund of the State of Nebraska". The law requires that the certificates issued to the banks shall be conspicuously displayed in their several places of business. The banks, therefore, could not be blamed for complying with this provision. However, it contains another provision which says that the bank may print or engrave on its stationery words to the effect that its deposits are protected by the Depositors Guaranty Fund. This being permissive the banks could be charged by its use with seeking to increase these deposits. However, as has been said in connection with another point discussed in this opinion, this case deals with the banks as a whole and neither side is able to sustain its position in many regards on the basis of individual banks.

Can the Banks Waive the Constitutionality of the Guaranty Fund Law?

Justice Holmes in his decision upon the Guaranty Fund Law based its constitutionality upon it being a proper exercise of the police powers of the state or, in other words, that the general needs of commerce would be conserved by such a statute. He brushed aside the question of charter rights as not in any way strengthening the position of the banks. This was in the Oklahoma case where there is a reservation allowing the Legislature to change or alter charter provisions. Possibly that might make some difference as Nebraska's constitution has no such reservation. However, the police power seems to be quite as far reaching and both depend upon being within the public needs of the state. He argues that the advantage of the Guaranty Fund Law is to make cash immediately available to pay depositors through that fund and further, that its "purpose [fol. 68] is to make the currency of checks secure and by the same stroke to make safe the almost compulsory resort of depositors to banks as the only available means for keeping money on hand". I have referred to Justice Holmes' opinion upon this point so that I might call attention to the fact that the present condition of the Guaranty Fund is not in accord with his expectations. I also have another

thought in mind: As that fund is no longer meeting the needs of the depositing public as anticipated by Justice Holmes, is the constitutional guaranty forbidding the taking of private property without compensation being violated by continuing the law in force? Now the only possible purpose in levying special assessments under the Guaranty Fund Law is to pay depositors in failed banks whose claims have already been adjudicated. Present day depositors cannot possibly receive any benefit therefrom. Such a situation was not in the mind of Justice Holmes when he wrote the opinion sustaining the constitutionality of the law. He justified an "insignificant taking" on the ground that the banks, by contributing to the Depositors Guaranty Fund, would create a condition that would make the currency of checks secure, would make safe the resort of depositors to state banks and would make failures almost impossible. Of course, he should not then foresee the great war or the accompanying inflation which followed, or the reaction that followed the later curtailment of credits. The Guaranty Fund Law as conceived by Justice Holmes is no longer serving its purposes.

Does not the same public need which was appealed to to sustain the constitutionality of the Bank Guaranty Law through the police powers of the state now demand that the banks should be denied the right to waive its unconstitutionality? In other words, is not the public interest superior to any individual right? It may be conceded that [fol. 69] the banks have taken advantage of the Guaranty Fund Law and reaped some profits therefrom, but if the general public needs banks where its deposits are protected and where checks pass as currency, then those needs must be regarded as superior to any right to penalize the banks.

The plaintiffs in their brief have effectively urged this position and I quote from it as follows:

"The question involved is of broader aspect than the individual and private rights of banks. Whether the law is constitutional is a question which concerns the public at large. It concerns the great mass of depositors in existing banks, who have a right to look to the strength of the banks and to the protection of the bank's right under constitutional guaranties. The protection of the rights of the

bank, by reason of the bank being a concern of quasi public character, is a public question. It is a matter of public concern and it is a matter of public welfare. This is due to the intimate relation that the bank sustains to the business and welfare of the state. The rule is stated in 27 R. C. L. p. 907, as follows:

"A waiver is not, however, allowed to be operative where it would infringe upon the rights of others, or would be against public policy or morals. Where the object of a law is the good of the public as well as of the individuals, such protection to the state cannot, at will, be waived by any individual, an integral part thereof. The fact that the individual is willing to waive his protection cannot avail. The public good is entitled to protection and consideration; and if, in order to effectuate that object, there must be enforced protection to the individual, such individual must submit to such enforced protection for the public good'."

This rule of law is of quite general application. Under it a minor has been denied the right to waive the requirements of an eight hour law because that law is in the nature of a state police regulation. Its object is the good of the public as well as the individual. The state, in this man- [fol. 70] ner, has intervened in its own behalf. The protection of the state cannot at will be waived by any individual, an integral part thereof. The fact that the individual is willing to waive his protection cannot avail. The public is entitled to be protected under the terms of the law.

Another class of cases that come within the purview of the rule here invoked is an attempt to waive the exemption provisions named by statute in connection with heads of families. Public policy says that such waivers in notes are contrary to the rights of the public as well as of the individual, who therefore cannot be allowed to waive them.

It would be a most inequitable rule of law which, acting through the police power in the interest of public welfare, after being used to save the life of an instrumentality of government could not after that instrumentality had become an evil and no long-- contributed to the public welfare, then withdraw the breath of life that it had earlier contributed.

What is the condition of the Guaranty Fund at this time? Justice Holmes in his opinion in a way apologizes for the taking of any property of the banks for the purpose of making good the deficiencies of another bank. But he justified it on the grounds that there really was no taking as the Guaranty Fund would be replenished in the end out of the assets of the failed bank and thus those contributing to the depositors' fund would receive back what remained. He also argued that the plan was a scheme of mutual protection for the banks which furnished sufficient compensation for the correlative burdens assumed.

How has Justice Holmes' conception worked out in practice? And what was the condition of the Guaranty Fund on December 31, 1928? A reference to a table prepared by the Guaranty Fund Commission giving the assets, liabilities and expected realization of the banks under its jurisdiction as of December 31, 1928, gives us the information [fol. 71] we need. The total liabilities of the failed banks are $26,400,282.76. The Commission expects to realize out of the assets of these banks $10,451,932.65. Therefore, the deficit is $15,948,350.11. Of course, the amount that may be realized from the assets of the defunct banks may be more or less than the ten million estimated. However, these estimates are based upon the experience of the Commission in handling assets of failed banks in the past and doubtless Secretary Peterson has made a fairly careful estimate.

The foregoing figures do not take into consideration the condition of the going banks which was discussed in the earlier part of this memorandum. It is quite evident from that discussion that unless some relief is granted the Guaranty Fund, this deficit of fifteen millions plus will be increased rather than decreased, even though all assessments now provided by law are continued indefinitely. We certainly can expect when the real condition of the Guaranty Fund is known to the depositing public that deposits in state banks will diminish just as they have increased under the more favorable conditions in the past. This in turn will result in lessened returns to that fund.

The Guaranty Fund, under the conditions existing, is no protection to the present day depositors. As a matter of fact it is a burden to the bank and just to the extent of that

burden makes them less able to meet the demands of their current depositors by keeping their banks solvent.

I therefore conclude my discussion of this point by saying that the banks should be allowed to plead the confiscatory results of the continuation of the special assessments to the Guaranty Fund and hence, their unconstitutionality as of today, not because of sympathy for the banks but because the perpetuity of the state banking system possibly may depend upon receiving relief from the burdens of [fol. 72] those assessments.

The Court therefore concludes that the injunction against the collection of the special assessment levied on December 15, 1928, and the levying and collection of other special assessments of a later date shall issue. However, this is without prejudice to the right of the Defendants to apply for a vacation of this injunction should the conditions so change that such special assessments can be paid by the state banks and at the same time said banks can receive in addition compensatory returns upon their capital.

Dated this 23rd day of April, 1929.

Lincoln Frost, Judge.

[File endorsement omitted.]

[fol. 73] In Supreme Court of Nebraska

Minute Entry re Bill of Exceptions

And afterwards to wit, on the 20th day of July, 1929, there was filed in the office of the Clerk of said Supreme Court of Nebraska, a certain bill of exceptions in three volumes, being numbered Volume 1, Volume 2, and Volume 3, such parts of which bill of exceptions as are mentioned and described in the præcipe for this record being bound in three separate volumes and numbered Volume 2, Volume 3, and Volume 4 of this record.

[fol. 74] Minute entry of argument and submission October 25, 1929, omitted in printing.

[fols. 75 & 76] IN SUPREME COURT OF NEBRASKA

No. 27070

ABIE STATE BANK, Abie, Appellee,

v.

ARTHUR J. WEAVER, Governor, et al., Appellants; Willis M. Stebbins, Treasurer, Intervener, Appellant; Mary E. Gandy et al., Interveners, Appellants; Frank Palmer et al., Interveners, Appellees; Edward Lincoln et al., Interveners, Appellees

Appeal from the District Court of Lancaster County

JUDGMENT—Dec. 7, 1929

This cause coming on to be heard upon appeal from the district court of Lancaster county, was argued by counsel and submitted to the court; upon due consideration whereof, the court finds error apparent in the record of the proceedings and judgment of said district court in that, contrary to the finding of that court, the levy of a special assessment upon the state banks pursuant to the provisions of Section 8028, Compiled Statutes 1922, as amended by Section 26, Chapter 191, Laws of 1923, does not constitute the taking of private property without due process of law. It is, therefore, considered, ordered and adjudged that the temporary injunction granted herein by said district court be, and hereby is, dissolved, the judgment is reversed and the action is hereby dismissed; that appellants pay all costs incurred herein by them, taxed at $, and have and recover of and from appellees their costs so expended; that appellees pay all costs incurred herein by them, taxed at $; for all of which execution is hereby awarded, and that a mandate issue accordingly.

Opinion by Dean, J.
Eberly, J., concurs in the result.
Rose and Day, JJ., dissent.

Charles A. Goss, Chief Justice.

[fol. 77] IN SUPREME COURT OF NEBRASKA

27070

ABIE STATE BANK

v.

WEAVER

OPINION—Filed December 7, 1929

1. "The banking business, carried on pursuant to a state charter, is quasi-public and, for protection of the public and in its interests, is subject to reasonable regulation by the state." Citizens State Bank v. Strayer, 114 Neb. 567.

2. It is elementary that it is not within the province of the courts to annul a legislative act unless its provisions so clearly contravene a provision of the fundamental law, or it is so clearly against public policy, that no other resort remains.

3. Where a state bank has accepted the benefits arising from the deposits of money pursuant to the terms of the bank depositors' guaranty law, such bank should not be heard, in a proper case, to make complaint of a special assessment upon such deposits which has been levied for the benefit of the depositors' guaranty fund.

4. Where a special assessment has been levied upon the state banks pursuant to the provisions of section 8028, Comp. St. 1922, as amended by section 26, ch. 191, Laws of 1923, such assessment does not constitute the taking of private property without due process.

[fol. 78] Heard Before Goss, C. J.; Rose, Dean, Good, Thompson, Eberly, and Day, JJ.

DEAN, J.:

This is an injunction suit begun in the district court for Lancaster county by the Abie State Bank, plaintiff, on its own behalf, and in which plaintiff is joined by 558 other Nebraska state banks. The suit was brought to enjoin the collection of a special assessment of one-fourth of one per cent. of the average daily deposits from the state banks

for 1928. It is alleged by plaintiff that the special assessment complained of was made December 15, 1928, by the department of trade and commerce, for the benefit of the depositors' guaranty fund, pursuant to authority conferred by section 8028, Comp. St. 1922, as amended by section 26, ch. 191, Laws of 1923. The act, as amended, follows:

"If the depositors' guarantee fund shall, from any cause, be depleted or reduced to any amount less than one per cent. of the average daily deposits as shown by the last semi-annual assessment statement thereof filed, the department of trade and commerce shall levy a special assessment against the capital stock of the corporations governed by the provisions of this article, to cover such deficiency, which special assessment shall be based on the *the* said average daily deposits, and, when required for the purpose of immediate payment to depositors, said special assessment may be for any amount not exceeding one per cent. of said average daily deposits for the year 1923 and thereafter not exceeding one-half of one per cent. of said average daily deposits in any one year."

[fol. 79] The governor of Nebraska and the secretary of the department of trade and commerce are both made parties defendant in official capacity. The state treasurer and a number of individual bank depositors intervened in the action adversely to the plaintiff's contention. The court, however, found generally in favor of the plaintiff bank and against the defendants and interveners. Thereupon defendants were ordered to pay all costs of the action, except those incurred by the interveners, and the cross-petitions of the interveners were dismissed, and interveners ordered to pay their own costs. Defendants and a number of the interveners have appealed.

The secretary of the guaranty fund commission, hereinafter called the secretary, testified that up to and including December 31, 1928, 269 state banks were closed by the state and placed in the hands of the commission, and that the total amount of the adjudicated claims was then $10,536,518.59, exclusive of interest; and that in 72 state banks, then being operated as going concerns, the amount due depositors was $13,726,441.26, and the total amount due depositors in banks which were in receivership, but whose claims were not yet adjudicated, was $2,133,627.54. It also

appears from the secretary's evidence that the total amount, including claims adjudicated, and claims not adjudicated, or present liabilities against the guaranty fund, was $26,400,282.76, and that the total sum of assets to be realized would be $10,451,932.65, leaving $15,948,350.11 as a deficit. The secretary also testified that the majority of the losses sustained by the banks resulted from loans made prior to 1923 during the deflation period.

[fol. 80] From the evidence of Clarence G. Bliss, secretary of the department of trade and commerce, it appears that since 1919 the total amount of bank assessments was $14,609,576.65, and that these assessments, in the above sum, were paid over and became a part of the guaranty fund.

It appears from the evidence of the president of one of the largest Nebraska state banks tha. he was active in the publication of 2,000 pamphlets which were distributed generally in respect of the establishment of the guaranty fund, and he was also chairman of a committee of three bankers by whom this suit was begun. In his expressed opinion, the payment of the special assessment, and its continuance for a number of years, would have the effect of causing the large state banks to "nationalize—all who can will nationalize and the balance will go out of business. I think four hundred banks will be operating with impaired capital."

In 1926, during the months of June, July, August, and September, twenty-six, full-page newspaper advertisements, attractively featured with pictures and aptly prepared reading matter, appeared in one of Omaha's leading newspapers. These advertisements stressed the proposed protection that was shortly to be afforded the depositors of money in the state banks throughout Nebraska. And on one page of these advertisements 336 banks are listed as having paid their pro rata share of the cost of publication. The largest state bank, located in Omaha, paid be-
[fol. 81] tween $500 and $600 as its share of the expense of this newspaper publicity. The enterprise was given wide circulation in practically every town and its suburbs where a state bank was located, by illustrated newspapers with reading matter that was calculated to attract favorable attention, and the patronage as well, of those having money for bank deposit. Following are some of the headings of the illustrated pages:

"A Story no other State can Tell;" "No Mattress Banks in Nebraska;" "Strong Banks make Strong States;" "In the Hands of Skilled Bankers;" "State Banks Protect their Deposits in Nebraska;" "Nebraska is a Remarkable State;" "Pushing your Money Through the Window;" "In Nebraska the Guarantee Works both Ways;" "All Work together in Nebraska;" "Safe through the Slump of Deflation Days;" "The Men Who Told the Story that no other State can Tell" concludes the series of illustrated pages, and is followed by an enumerated list of the 336 state banks that sponsored the depositors' guaranty fund enterprise.

From the evidence it clearly appears that a majority of the state bankers throughout Nebraska, and many others as well, counted the bank depositors' guaranty fund, in its inception, a valuable asset, and many predicted that this beneficent plan would add greatly to the stability of the state banks. To illustrate this feature of the guaranty fund law, a brief excerpt from an advertisement which appeared in January, 1928, in one of the Nebraska papers having a large circulation, may be noted:

[fol. 82] "First, there are a few state bankers here and there who have good banks and who think they are greatly imposed upon by being compelled to pay an assessment to the guaranty fund. This is a natural feeling as they are in no way responsible for the banks that fail. * * * The guaranty fund, so-called, is merely an insurance company whereby the state banks of Nebraska are the members and must pay through an assessment each other's losses up to the maximum amount of six-tenths of one per cent. a year. * * * Any good bank, making a fair profit, can pay this assessment without injury to itself and can do so to the great benefit of the state."

In respect of the many failures of banks about this time, the cashier of a Lincoln state bank testified that, in his opinion, the failure of nearly 300 Nebraska state banks was caused largely by the general economic condition existing prior to 1928; that he did not think the bank assessments from 1923 to July 1, 1928, were a contributing factor in the failure of banks during that period, and that, in his opinion, the guaranty fund law and the assessments collected thereunder had a steadying influence on the deposits

of every state bank. Continuing, he testified that "it is no exaggeration to say it has accounted for at least one hundred million dollars deposited in the state banks of Nebraska which would not otherwise have been made except for the bank guaranty law." In his opinion, the condition of the banks and their liability to pay the assessment is "incomparably better than in 1923."

In the present case, the trial court found that the guaranty fund was confiscatory, and that its enforcement con- [fol. 83] stituted the taking of private property without due process, and that there should therefore be an indefinite abatement of the enforcement of the act until such time as such enforcement could be made without mischievous consequences. It may be observed, however, that the bank guaranty fund law has been held by the highest court in the land to be a constitutional act and well within the meaning of the federal Constitution.

Substantially like questions as here involved were considered and decisions were rendered by the supreme court of the United States in Noble State Bank v. Haskell, 219 U. S. 104, and Assaria State Bank v. Dolley, 219 U. S. 121, and in both cases it was held that the act was not repugnant to the provisions of the Constitution. And in Shellenberger v. First State Bank, 219 U. S. 114, a case involving the validity of the guaranty fund law of our own state, the act was again upheld on authority of the decision in the above cited Noble State Bank case. In its memorandum opinion (219 U. S. 575) denying the application for rehearing in the Noble State Bank case, the court said this:

"Even where powerful arguments can be made against the wisdom of (this) legislation this court can say nothing, as it is not concerned therewith." And in the body of the opinion, Mr. Justice Holmes, the author of the opinion, among others, made this observation:

"We fully understand the practical importance of the question and the very powerful argument that can be made against the wisdom of the legislation, but on that point we [fol. 84] have nothing to say, as it is not our concern. * * * The payment can be avoided by going out of the banking business, and is required only as a condition for keeping on, from corporations created by the state."

First State Bank of Claremont v. Smith, 49 S. Dak. 518, 207 N. W. 467, is cited by defendants and is in point. The

court there observed that the banks had for many years accepted the benefits of the guaranty fund law and in consequence were not then in position to resist the just claims of depositors. The court also observed that the personal rights of the individual must always yield to the "rightful exercise of the police power."

The Nebraska statute contains this provision for the direction of those who are charged with the administration of banking:

"The business of banking, or the receiving of deposits of money or instruments of credit subject to be repaid upon check, draft, certificate, passbook or order; the discounting, negotiating of promissory notes, drafts, bills of exchange, and other evidences of debts; and the loaning of money upon personal or other security is hereby declared to be a quasi-public business and subject to regulation and control by the state." Comp. St. 1922, sec. 7983.

"The banking business, carried on pursuant to a state charter, is quasi-public and, for protection of the public and in its interests, is subject to reasonable regulation by the state." Citizens State Bank v. Strayer, 114 Neb. 567.

[fol. 85] It may here be noted that the maximum amount of the guaranty fund special assessment was reduced by the legislature in 1923 from one per cent. to one-half of one per cent., but subsequently the department of trade and commerce, pursuant thereto, levied the special assessment of one-fourth of one per cent., within the maximum amount now fixed by the legislature, and of which complaint is now made by the plaintiff bank on its own behalf and in behalf of 558 other state banks, as above noted.

The paramount object, and clearly the legislative intention in the creation of the depositors' bank guaranty fund law, was first for the protection of the depositors' money in the state banks. And from the fact that, under normal banking conditions, such act would likewise benefit the state banks, such banks were, at least, not unfriendly to the enactment of the law in question. But it goes without saying that there never was, nor could be, any compulsion upon the state banks to accept deposits of money on the bank guaranty basis. But money was accepted by the state banks, pursuant to the terms of the depositors' guaranty fund law, and by that law such banks are clearly bound.

The demands on the guaranty fund are burdensome, but the situation before us was created, or in any event was made possible, by the legislature in the enactment of the law. It is a basic principle that it is, ordinarily, not within the province of the courts to annul a legislative act except as a last resort and in a case where no other remedy is at hand. In view of the benefits arising from the deposits of [fol. 86] large sums of money in state banks, pursuant to the terms of the bank depositors' guaranty fund, should the banks now be heard to make complaint of the special assessment of one-fourth of one per cent. upon their deposits? Have the observations of Judge Holmes in the Noble State Bank case, above cited, ever been answered? If so, our attention has not been directed thereto.

For the reasons herein appearing, the temporary injunction granted by the district court is dissolved, the judgment is reversed, and the action dismissed.

Reversed and dismissed.

Eberly, J., concurs in the result.
Rose and Day, JJ., dissent.

[fols. 87 & 88] In Supreme Court of Nebraska

Minute Entry re Rehearing

And afterwards, to wit, on the 10th day of January, 1930 there was filed in the office of the Clerk of said Supreme Court of Nebraska, a certain motion for rehearing, together with briefs in support of the same, which motion was overruled on the 18th day of January, 1930, and a rehearing denied.

[fol. 89] IN SUPREME COURT OF NEBRASKA

[Title omitted]

PETITION FOR ORDER ALLOWING AN APPEAL—Filed Feb. 13, 1930

Exhibit "A." G. H. T.

To the Hon. Charles A. Goss, Chief Justice of the Supreme Court of the State of Nebraska:

The plaintiff and appellant, Abie State Bank, Abie, Nebraska, by its attorneys, Frank H. Gaines, Leonard A. Flansburg and S. S. Sidner, show by this petition:

That the plaintiff and appellee, Abie State Bank, Abie, Nebraska, is a corporation organized and doing business under the laws of the State of Nebraska and a citizen and resident of said state; that on the 7th day of December, 1929 in said Supreme Court of the State of Nebraska, a judgment was rendered against the plaintiff and appellant in a suit known and numbered as General Number 27070 of said court wherein the Abie State Bank was plaintiff and appellee and Arthur J. Weaver as Governor of the State of Nebraska and Clarence G. Bliss as Secretary of the Department of Trade and Commerce were defendants and appellants; that thereafter on the 10th day of January, 1930; the plaintiff and appellant filed a motion in said court for a rehearing in said case and thereafter, on the 18th day of January, 1930 said motion for rehearing was by said court overruled and denied, whereupon said judgment became and is final.

[fols. 90 & 91] That the Supreme Court of the State of Nebraska is the highest court of said state of Nebraska in which a decision in this case and this matter could be had.

That, as appears by the record, proceedings and decision of said Supreme Court, there was drawn into question in said suit and proceedings the validity of a statute of the state of Nebraska, to-wit: Section 8028 of Chapter 191 of the Session Laws of the State of Nebraska for the year 1923 and of the special assessment levied under and in pursuance to said statute; that in said case it was adjudged by the Supreme Court of the State of Nebraska that the levy-

ing of the assessment called for by said statute did not deprive this plaintiff and other allied banks of property without due process of law; all of which fully appears in the record and proceedings in the case and is specifically set forth in the assignments of error filed herewith.

Wherefore plaintiff prays for the allowance of an appeal from the Supreme Court of the State of Nebraska to the Supreme Court of the United States for the correction of the errors complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States and that the proper order be entered fixing the amount of bond or security required of plaintiff and appellant.

F. H. Gaines, Leonard A. Flansburg, S. S. Sidner,
Attys. for plaintiff and appellant.

The petition of plaintiff for an appeal as prayed for in the foregoing petition is hereby allowed this 13th day of February, 1930, conditioned on plaintiff giving bond conditioned as required by law in the sum of $1000.00.

Dated at Lincoln, Nebraska, this 13th day of February, 1930.

Charles A. Goss, Chief Justice.

[File endorsement omitted.]

[fol. 92] In Supreme Court of Nebraska

[Title omitted]

Assignments of Error—Filed Feb. 13, 1930

Exhibit "B." G. H. T.

Considering itself aggrieved by the final decision of the Supreme Court of the State of Nebraska in the above entitled case and a petition having been filed for an order allowing an appeal to the Supreme Court of the United States, the plaintiff and appellant, Abie State Bank, Abie, Nebraska, assigns the following errors in the record and proceedings in said case:

First. The Supreme Court of Nebraska erred in holding that a special assessment levied upon the state banks of Nebraska pursuant to the provisions of Section 8028, Compiled Statutes of 1922, as amended by Section 26, Chapter 191, Laws of 1923, does not constitute the taking of private property without due process, for at the time the special assessment was levied the Guaranty Fund was hopelessly insolvent,—the deficit exceeding $15,000,000, and the purpose of the assessment was to pay depositors in banks that had failed.

Second. The Supreme Court of Nebraska erred in holding that a special assessment levied upon the state banks of Nebraska to pay depositors in banks that had failed [fol. 93] would not deprive the plaintiff of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

Third. The Supreme Court of Nebraska erred in holding that where a state bank has accepted the benefits arising from the deposit of money pursuant to the Banks' Deposit Guaranty Law such bank cannot be heard to make complaint of a special assessment which had been levied upon deposits for the benefit of the Depositors' Guaranty Fund.

Fourth. The Supreme Court of Nebraska erred in holding that the plaintiff and appellant and state banks of Nebraska cannot object to confiscatory assessments to pay the losses of depositors in banks that had failed because in the past some benefits may have accrued to the banks through a Guaranty Fund which no longer exists, for the enforcement of such assessments deprives the plaintiff and appellant of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

Fifth. The Supreme Court of Nebraska erred in holding that the plaintiff and appellant cannot complain of confiscatory assessments because it has done business as a bank pursuant to the provisions of the Guaranty Fund Act. The plaintiff and appellant bank and more than four hundred banks associated with it in this case were engaged in the banking business prior to the legislative enactment under

which the special assessment is levied. Such banks were compelled to do business under the law or forfeit their charter which would amount to confication of their property. To hold that such banks cannot complain of confiscatory assessments arising under the operation of the law is to deprive them of their property without due process of [fol. 94] law and violates the Fourteenth Amendment to the Constitution of the United States.

Sixth. The Supreme Court of Nebraska erred in holding that after the Guaranty Fund had become hopelessly insolvent and every purpose sought to be accomplished by it had failed the plaintiff and appellant must continue to contribute confiscatory special assessments to pay the losses of depositors in banks that had failed. Under such admitted conditions, to take the property of state banks to pay the losses of depositors in failed banks is to deprive them of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

Seventh. The Supreme Court of Nebraska erred in holding that the special assessments levied against the state banks to pay the losses of banks that had failed do not amount to taking of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States since the operation of the law by the enforced collection of the assessments complained of is not justified under the police power of the state and bears no rational relation to any public purpose under the admitted conditions shown by the record.

Eighth. The Supreme Court of Nebraska erred in holding that special assessments which are confiscatory can be levied against state banks to pay the losses of depositors in banks that had failed as such special assessments would deprive the stockholders in state banks and their depositors of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

[fol. 95] Ninth. The Supreme Court of Nebraska erred in holding that substantially like questions as are here in-

volved were considered and decisions were rendered by the Supreme Court of the United States in Noble State Bank vs. Haskell and Assaria State Bank vs. Dolley and Shallenberger vs. First State Bank, the decisions of the Supreme Court of the United States having been rendered nearly twenty years ago and based upon conditions then existing which are entirely different from the facts and conditions presented to the court in this case.

Tenth. The Supreme Court of Nebraska erred in reversing the decree and decision of the lower court and in ordering judgment to be entered and in entering judgment against plaintiff and appellant.

Wherefore, for these and other manifest errors appearing in the record, the said Abie State Bank, a corporation, plaintiff and appellant, prays that the judgment of the Supreme Court of Nebraska be reversed and set aside and held for naught and that judgment be rendered for plaintiff and appellant including judgment for its costs.

F. H. Gaines, Leonard A. Flansburg, S. S. Sidner,
Attorneys for plaintiff and appellant.

[File endorsement omitted.]

[fols. 96 & 97] In Supreme Court of Nebraska

No. 27070

Abie State Bank, Abie, Appellee,

v.

Arthur J. Weaver, Governor, et al., Appellants; Willis M. Stebbins, Treasurer, Intervener, Appellant; Mary E. Gandy et al., Interveners, Appellants; Frank Palmer et al., Interveners, Appellees; Edward Lincoln et al., Interveners, Appellees

Appeal from the District Court of Lancaster County

Order Allowing Appeal—Feb. 13, 1930

The appeal as prayed for in the petition this day filed herein is hereby allowed this 13th day of February, 1930.

conditioned on plaintiff and appellant giving bond conditioned as required by law in the sum of $1,000.

The above entitled matter coming to be heard upon the petition of the plaintiff and appellant herein for an appeal from the Supreme Court of the State of Nebraska to the Supreme Court of the United States, and upon examination of said petition and the record in said matter, and desiring to give the plaintiff and appellant an opportunity to present to the Supreme Court of the United States the questions presented by the record in said matter, it is ordered that an appeal be and the same is hereby allowed to the Supreme Court of the United States and the bond presented by the plaintiff and appellant be and the same is hereby approved.

Chas. A. Goss, Chief Justice.

[fols. 98 & 99] In Supreme Court of Nebraska

[Title omitted]

Order Allowing an Appeal—Filed Feb. 13, 1930

Exhibit "C". G. H. T.

The appeal as prayed for in the petition this day filed herein is hereby allowed this 13th day of February, 1930 conditioned on plaintiff and appellant giving bond conditioned as required by law in the sum of $1000.00.

The above entitled matter coming on to be heard upon the petition of the plaintiff and appellant herein for an appeal from the Supreme Court of the State of Nebraska to the Supreme Court of the United States, and upon examination of said petition and the record in said matter, and desiring to give the plaintiff and appellant an opportunity to present to the Supreme Court of the United States the questions presented by the record in said matter, it is ordered that an appeal be and the same is hereby allowed to the Supreme Court of the United States and the bond presented by the plaintiff and appellant be and the same is hereby approved.

Charles A. Goss, Chief Justice of the Supreme Court of Nebraska.

[File endorsement omitted.]

[fol. 100] IN SUPREME COURT OF NEBRASKA

ORDER FOR APPEAL—Filed Feb. 13, 1930

Exhibit "D". G. H. T.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Justices of the Supreme Court of the State of Nebraska, Greeting:

Because in the records and proceedings and judgment in the cause lately pending in the Supreme Court of the State of Nebraska, being the highest court of said state in which a decision in the cause could be had, between Abie State Bank, a corporation, plaintiff and appellant, and Arthur J. Weaver, as Governor of the State of Nebraska, and Clarence G. Bliss, as Secretary of the Department of Trade and Commerce of the State of Nebraska, and intervenors, defendants and appellees, wherein was drawn in question the validity of a statute of the State of Nebraska, on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity, it appears that the said Abie State Bank is entitled to have the said judgment reviewed by the Supreme Court of the United States, and the said Abie State Bank having presented a petition for a writ on appeal and assignment of errors to that end.

And we, being willing that error, if any hath occurred, should be duly corrected and full and speedy justice done to the parties aforesaid, do command you that under your seal, distinctly and openly, you send the record, proceedings and judgment aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, and that you have the same in the said Supreme Court at Washington within thirty days from the date hereof, so that the said Supreme Court may examine and consider the same and may cause further to be done to correct the error therein, if any hath occurred, as of right and according to the laws and customs of the United States should be done.

[fols. 101 & 102] Witness the Honorable Willis Van Devanter, Associate Justice of the United States Supreme

Court, this 13th day of February, in the year of our Lord, one thousand nine hundred and thirty.

R. C. Hoyt, Clerk of the District Court of the United States, District of Nebraska, by J. B. Nickerson, Deputy. Charles A. Goss, Chief Justice of the Supreme Court of the State of Nebraska. (Seal United States District Court, District of Nebraska, Lincoln Division.)

[File endorsement omitted.]

[fols. 103-106] Citation, in usual form, showing service on C. A. Sorensen et al., filed February 19, 1930, omitted in printing.

[fols. 107-109] Bond on appeal for $1,000.00, approved and filed February 15, 1930, omitted in printing.

[fols. 110 & 111] Certificate of lodgment omitted in printing.

[fol. 112] In Supreme Court of Nebraska

[Title omitted]

Præcipe for Transcript of Record—Filed Feb. 19, 1930

Exhibit "F". G. H. T.

To the Clerk of the Supreme Court of the State of Nebraska:

In order that the plaintiff and appellee may have a record for a review of the decision of this court, make and transmit to the Supreme Court of the United States a copy of that portion of the records of this court designated herein:

The petition shown at pages 2 to 26 inclusive of the transcript.

Answer of the defendants Weaver and Bliss shown at pages 42 to 60 inclusive of the transcript.

Reply of the plaintiffs shown at page 93 of the transcript.

The decree of the district court of Lancaster County shown on pages 98, 99 and 100 of the transcript.

The opinion of the district court of Lancaster County, Nebraska, shown on pages 101 to 120, inclusive, of the transcript.

The opinion of the Supreme Court in above case and the journal entry or decree thereon, date of filing motion for rehearing and date of order overruling same.

From the bill of exceptions you will copy all of Volume I except Exhibits 6, 7 and 8 and pages 96, 97 and 98 and the [fol. 113] stipulation with reference to intervenors shown on pages 191 to 195, inclusive. Attention is called to the fact that Exhibit 11 in Volume I is shown in pamphlet form while only the paragraph shown at the top of page 98 of said pamphlet and the paragraph shown at the bottom of page 99 and the top of page 100 were introduced in evidence. The balance of the exhibit should be omitted.

You will also copy all of Volume II of the bill of exceptions except omit pages 348 to the middle of page 353 and Exhibit 37. Also omit commencing at the middle of page 383 and all of page 384 and omit that part of the bill of exceptions appearing at the bottom of pages 496 and 497. The portion sought to be omitted is shown at pages 496a to 496ee.

You will also copy all of Volume III except omit therefrom pages 689 to 701, inclusive, and pages 712 to the middle of page 716. You will also note that Exhibit 60 is a large pamphlet and that pages 877 and 879 only were introduced in evidence. The balance of the exhibit except pages 877 and 879 should be omitted.

You will include in the transcript petition for order allowing an appeal, order allowing an appeal, assignment of errors, bond, order for appeal from Federal court, citation and præcipe.

Abie State Bank, by F. H. Gaines, Leonard A. Flansburg, S. S. Sidner, Its Attorneys.

[fol. 114] STATE OF NEBRASKA,
Lancaster County, ss:

I, the undersigned attorney for defendants and appellees in the above entitled matter, hereby acknowledge re-

ceipt of a copy of the above præcipe and acknowledge due service of the above præcipe on me this 13th day of February, 1930.

C. A. Sorensen, Attorney General, Attorney for Defendants and Appellees and for Willis M. Stebbins, Intervenor.

The undersigned acknowledges receipt of copy and due service of the above citation on this 14th day of February, 1930, and enters appearance for the parties represented by him.

C. J. Campbell, William J. Holz, Attorney for Mary E. Gandy, James H. Covey, Theodore H. Buelt, Huffman & Seymour, Inc. (a Corporation), Leonard N. Seymour, John Halbur, and Frank A. Hebenstreit.

[fol. 115] The undersigned acknowledges receipt of copy and due service of the above citation on this 17th day of February, 1930, and enters appearance for the parties represented by him.

Roper & Fuller, by R. C. Roper, Attorney for Frank Palmer, James M. Stephens, Robert L. Brown, Laura A. Smith, Fred Woodruff, Burr R. Stroman, Matta Palmer, Blanche Modlin, J. J. Brown, Executor of the Last Will and Testament of William R. Brown, Deceased; Lillian W. Palmer, Arthur M. Smith, Trustee; James D. Wolfe, John D. Modlin, Catherine L. Stroman, and Osa Stephens.

The undersigned acknowledges receipt of copy and due service of the above citation on this 15th day of February, 1930, and enters appearance for the parties represented by him.

W. W. Wenstrand, W. L. Cropper, W. L. Donovan, Attorney for Edward Lincoln, George W. Harding, and Henry M. Lubbe.

[File endorsement omitted.]

[fol. 116] Return to order for appeal omitted in printing.

[fol. 117] Clerk's certificate to transcript of record omitted in printing.

[fol. 118] In Supreme Court of Nebraska

[Title omitted]

Order Extending Time—Mar. 12, 1930

Now on this 12th day of March, A. D., 1930, upon the motion of plaintiff, and also upon the motion of Charles B. Letton, Clerk of the Supreme Court, for an order enlarging time for making return hereto, and good cause appearing therefor, it is hereby ordered, adjudged and decreed that the time in which plaintiff may file, docket and record the above entitled cause of action with the Clerk of the Supreme Court of the United States at Washington, D. C., shall be, and hereby is, extended to the 29th day of March, A. D., 1930, and the return day hereto is hereby extended to said date.

Charles A. Goss, Chief Justice. [Seal]

[fol. a] [File endorsement omitted]

[fol. 1] In District Court of Lancaster County

[Title omitted]

Lincoln, Nebraska, July 2, 1929

Received of the attorneys for defendants Arthur J. Weaver as Governor of the State of Nebraska, and Clarence G. Bliss as Secretary of the Department of Trade and Commerce, and also from attorneys for Willis M. Stebbins as Treasurer of the State of Nebraska, Intervenor, and also of attorneys for intervenors Mary E. Gandy, James H. Covey, Theodore H. Boldt, Huffman & Seymour, Inc. (a corporation), Leonard N. Seymour, John Halbur and Frank A. Hebenstreit, for examination and amendment, the within draft of a Bill of Exceptions consisting of Volumes 1, 2 and 3, this being Volume 1 of same.

Gaines, McGilton, Van Orsdel & Gaines, Hainer, Flansburg & Lee, Courtright, Sidner, Lee & Gunderson, Attorneys for Plaintiff and the other banks listed on Exhibit A of petition.

Lincoln, Nebraska, July 11th, 1929.

We herewith return the within Bill of Exceptions, consisting of Volumes 1, 2 and 3, heretofore submitted for examination and amendment, and propose no amendments thereto.

[fol. 1a] Courtright, Sidner, Lee & Gunderson, Gaines, McGilton, Van Orsdel & Gaines, Hainer, Flansburg & Lee, Attorneys for plaintiff and the other banks listed on Exhibit A of petition.

[fol 2] Received, on July 13th, 1929, of the attorney for defendants Arthur J. Weaver as Governor of the State of Nebraska, and Clarence G. Bloss as Secretary of the Department of Trade and Commerce, and also from attorneys for Willis M. Stebbins as Treasurer of the State of Nebraska, Intervenor, and also of attorneys for intervenors Mary E. Gandy, James H. Covey, Theodore H. Buelt, Huffman & Seymour, Inc., a corporation, Leonard N. Seymour, John Hallon and Frank V. Hohenstreit, for examination and Amendment, the within draft of a Bill of Exceptions consisting of Volumes 1, 2 and 3, this being Volume 1 of same.

And now on July 11th, 1929, we herewith return the within Bill of Exceptions, this submitted for examination and amendment, and propose no amendments thereto.

Roper and Fuller, Attorneys for Intervenors Frank Palmer, James M. Stephens, Robert L. Brown, Laura A. Smith, Ered Woodruff, Burr R. Stroman, Matta Palmer, Blanche Moulin, J. J. Brown, Executor of the Last Will and Testament of William R. Brown, Deceased, Lillian W. Palmer, Arthur M. Smith, Trustee, James D. Wolfe, John D. Moulin, Catherine L. Stroman, and Osa Stephens.

Received, on July 17, 1929, of the attorneys for defendants, Arthur J. Weaver as Governor of the State of Nebraska, and Clarence G. Bloss as Secretary of the Department of Trade and Commerce, and also from attorneys for Willis M. Stebbins as Treasurer of the State of Nebraska, Intervenor, and also of attorneys for intervenors Mary E. Gandy, James H. Covey, Theodore H. Buelt, Huffman &

Seymour, Inc. (a corporation), Leonard N. Seymour, John Halbur and Frank A. Hebenstreit, for examination and amendment, the within draft of a Bill of Exceptions consisting of Volumes 1, 2 and 3, this being Volume 1 of the same.

And now on July 17th, 1929, we herewith return the within Bill of Exceptions thus submitted for examination and amendment, and propose no amendments thereto.

M. L. Donovan and W. W. Wenstrand, Attorneys for Edward Lincoln, George W. Harding, and Henry M. Lubbe, Intervenors.

[fols. 3-7] In District Court of Lancaster County

101-202

Abie State Bank, Abie, Nebraska, Plaintiff,

vs.

Arthur J. Weaver, as Governor of the State of Nebraska, and Clarence G. Bliss, as Secretary of the Department of Trade and Commerce, Defendants; Willis M. Stebbins, as Treasurer of the State of Nebraska, Intervenor; Mary E. Gandy, James H. Covey, Theodore H. Buelt, Huffman & Seymour, Inc. (a corporation), Leonard N. Seymour, John Halbur, and Frank A. Hebenstreit, Intervenors; Frank Palmer, James M. Stephens, Robert L. Brown, Laura A. Smith, Fred Woodruff, Burr R. Stroman, Matta Palmer, Blanche Modlin, J. J. Brown, Executor of the Last Will and Testament of William R. Brown, Deceased; Lillian W. Palmer, Arthur M. Smith, Trustee; James D. Wolfe, John D. Modlin, Catherine L. Stroman, and Osa Stephens, Intervenors; Edward Lincoln, George W. Harding, and Henry M. Lubbe, Intervenors

Bill of Exceptions—Filed July 20, 1929

Appearances of Counsel

Messrs. Hainer, Flansburg & Lee, Messrs. Gaines, McGilton, Van Orsdel & Gaines; Messrs. Courtright, Sidner,

Lee & Gunderson, appearing as attorneys for the plaintiff; and

Messrs. C. A. Sorensen, Attorney General; Edgar Ferneau and C. E. Abbott, appearing as attorneys for defendants, and also on behalf of Willis M. Stebbins, as State Treasurer of the State of Nebraska; and

Messrs. William Hotz and C. J. Campbell, appearing as attorneys for Intervenors Mary E. Gandy, James H. Covey, Theodore H. Buelt, Huffman & Seymour, Inc. (a corporation), Leonard N. Seymour, John Halbur, and Frank A. Hebenstreit, for themselves and all other depositors similarly situated.

The other intervenors named made no appearance and offered no evidence at the trial.

[fol. 8] CAPTION

Be it remembered, that at the January 1929 Term of the District Court of Lancaster County, Nebraska, to-wit: January 28, 1929, that being one of the days of said term, the cause of Abie State Bank, Abie, Nebraska, Plaintiff, vs. Arthur J. Weaver, as Governor of the State of Nebraska, and Clarence G. Bliss, as Secretary of the Department of Trade and Commerce, Defendants, and Willis M. Stebbins as Treasurer of the State of Nebraska, Intervenor, and Mary E. Gandy, James H. Covey, Theodore H. Buelt, Huffman & Seymour, Inc. (a corporation), Leonard N. Seymour, John Halbur, and Frank A. Hebenstreit, Intervenors, and Frank Palmer, James M. Stephens, Robert L. Brown, Laura A. Smith, Fred Woodruff, Burr R. Stroman, Matta Palmer, Blanche Modlin, J. J. Brown, Executor of the Last Will and Testament of William R. Brown, Deceased, Lillian W. Palmer, Arthur M. Smith, Trustee, James D. Wolfe, John D. Modlin, Catherine L. Stroman and Osa Stephens, Intervenors, and Edward Lincoln, George W. Harding and Henry M. Lubbe, Intervenors, came on for hearing before Honorable Lincoln Frost, one of the judges of said court; and the plaintiff (on its own behalf and on behalf of the other banks listed on Exhibit A of its petition), and the defendants and the Intervenors Willis M. Stebbins as Treasurer of the State of Nebraska, Mary E.

Gandy, James H. Covey, Theodore H. Buelt, Huffman & Seymour, Inc. (a corporation), Leonard N. Seymour, John Halbur, and Frank A. Hebenstreit, each to maintain the issues on their respective parts, adduced testimony and offered evidence, and all of said evidence and testimony, all of the objections thereto, with the grounds therefor, all of the rulings of the court on such objections, together with all of the exceptions to such rulings made and taken at the time having been by the defendants and by the Intervenors Willis M. Stebbins as Treasurer of the State of Nebraska, Mary E. Gandy, James H. Covey, Theodore H. Buelt, Huffman & Seymour, Inc. (a corporation), Leonard N. Seymour, John Halbur, and Frank A. Hebenstreit, herein reduced to writing in this their Bill of Exceptions, consisting of Volumes 1, 2 and 3, and said defendants and said intervenors having served the same upon the attorneys for the plaintiff and banks listed on Exhibit A attached to plaintiffs petition, and on attorneys for the other intervenors for examination and amendment, as required by law, said defendants and intervenors Willis M. Stebbins as Treasurer of the State of Nebraska, Mary E. Gandy, James H. Covey, Theodore H. Buelt, Huffman & Seymour, Inc. (a corporation), Leonard N. Seymour, John Halbur and Frank A. Hebenstreit, now pray the court before whom said cause was tried that said Bill of Exceptions, consisting of Volumes 1, 2 and 3, may be now settled, signed, sealed and made a part of the record in said cause in said court, this being Volume 1.

[fol. 9] By Mr. Gaines: It is agreed that Arthur J. Weaver is now Governor of the State of Nebraska and should be substituted as defendant instead of Adam McMullen, the preceding Governor.

Mr. Van E. Peterson, produced and duly sworn on behalf of the plaintiffs, testified as follows:

Examined by Mr. Gaines for the plaintiffs:

1 Q. State your name?

By Mr. Abbott: The defendants and intervenors severally object to the introduction of any evidence in this case

for the reason that the petition of the plaintiff filed herein does not state a cause of action in favor of any bank listed in Exhibit "A" attached to the petition.

The Court: Overruled.

Exception.

A. Van E. Peterson.

2 Q. Where do you reside?

A. Lincoln, Nebraska.

3 Q. State your present business or work.

A. I am Secretary of the Guaranty Fund Commission.

4 Q. How long have you held such office?

A. Since May, 1923.

5 Q. As such, have you charge of the records and files of that office?

A. I do.

6 Q. Does that office keep a record of the amount of [fol. 10] claims allowed against the Guaranty Fund?

A. It does.

7 Q. Does that office, under you as Secretary, or are the banks that are being operated by the Commission under your direction and supervision?

A. They are.

8 Q. How many banks, state banks, are now being operated by the Guaranty Fund Commission?

A. If I may get my records out (referring to notes); as explanation to the Court our records in the office are compiled and statements are only made up every three months so the last available statement is of December 31, 1928. On that date we were operating 72 banks.

9 Q. Now explain to the Court what you mean by your statement, "operating 72 banks".

A. Under the law the Commission has the option of operating a bank as a going concern or placing it in receivership at once and these 72 banks are being operated as going concerns.

10 Q. Are these operated banks insolvent?

By Mr. Abbott: I object to that as calling for conclusion of the witness, immaterial and not the best evidence, a leading question and no proper foundation laid.

The Court: I am inclined to think that the question should not be asked in that general way.

11 Q. Have you made an investigation through your office of each bank now being operated by you?

[fol. 11] A. We have.

12 Q. And what is the result of that investigation, as to their being solvent or insolvent?

By Mr. Abbott: I object to that as immaterial and no proper foundation laid.

The Court: You may answer.

Exception.

A. We found they are insolvent, in our opinion.

By Mr. Ferneau: I move to strike out the answer as a mere conclusion of the witness, no foundation laid, nothing to show witness made any personal investigation in any bank.

The Court: Overruled.

Exception.

13 Q. Can you tell the dates when those different banks, what personal investigation have you made in those various banks?

A. When a bank is closed by the Department of Trade and Commerce an inventory is made of all the assets and liabilities of that bank, copy of which comes to our office. Men working under my direction investigate the assets of the bank, their probable value, and make a full and complete report to the office as to the condition of that bank.

14 Q. Is that proceeding one that is required by law to be made?

A. Yes, the inventory is.

15 Q. Then do you go over those reports?

A. Yes, quite often. I go over them myself but I do not always look them over when they first come into the office.

16 Q. Now, in your opinion, from the investigation of those reports which are filed with you, what is the condition of those banks, as to being insolvent or solvent?

[fol. 12] Mr. Abbott: I object as the witness states the inventory is only a requirement of law.

The Court: Overruled.

Exception.

A. They are insolvent.

17 Q. Now can you give the dates when those failed banks came into the control of your Department. Can you tell from the data you have with you how many banks [illegible] (interrupted)

Mr. Abbott: For the purpose of the record we enter an objection to the introducing of any further evidence along this line and specifically to the question asked for the reason that it calls for evidence and testimony wholly immaterial to the issues in this case.

Mr. Campbell: Objections regarding all matters are on behalf of both defendants and intervenors.

The Court: Objection overruled.

Exception.

18 Q. [illegible] the calendar year, 1928?

A. All our records are kept by fiscal years rather than by the calendar year. The fiscal year ended June 30, 1928 and for the six months following.

19 Q. That is you don't know how many banks were taken in from January 1, 1928 but from the first of July?

A. I had of course to do some figuring to bring that up and there were 60 banks closed during the calendar year 1928 and [illegible] There were two other banks [illegible] but which had not been [illegible] and make a total of 62 banks.

[fol 121] 20 Q. Take the preceding year, 1927, can you state the number taken over in that year?

A. Those records are given by fiscal years.

21 Q. Give it by fiscal years then, from June 1927 to June 1928 if that is when your fiscal year is.

A. You would need to divide those figures referring to papers and say that from July 1, 1927, to December 31, 1927 there were 44 banks closed.

22 Q. That is from July 1, 1927 to January 1, 1928, there were 44 banks closed?

A. July 1, 1927 to December 31, 1927.

23 Q. There were 44?

A. There were.

24 Q. Now for the fiscal year preceding that?

A. For the fiscal year July 1, 1926 to June 30, 1927 there were 40 banks closed.

25 Q. Take the preceding year?

A. For the fiscal year 1925 to 1926, 29 banks.

26 Q. And the fiscal year 1924 to 1925?

A. 35 banks.

27 Q. And the preceding year?

A. 1923 to 1924, 25 banks.

28 Q. That was the beginning of the Department?

A. Yes.

29 Q. Then you have gone back to the date of your department, when your department began to operate?

A. No, the Commission was in operation in May and June before that.

[fol. 14] 30 Q. What banks, if any, were taken over during that period, or were those included in the figures for the year 1923?

A. I don't believe I have that number here.

31 Q. Do you know by recollection—you don't know how many?

A. There were some, a few.

32 Q. Now you may state how many banks are being operated under receivership at the present time?

A. 179.

33 Q. How many of those receiverships have taken place since your department took charge?

A. 132.

34 Q. 132 since May 1923; now the receiverships that are still on your books?

A. 132. There have been four that have been entirely closed and taken off the books.

35 Q. Four, in addition to the 132, that is during your regime?

A. Yes, sir.

36 Q. And the 47 old receivership banks being operated at the time the Guaranty Fund Commission took charge?

A. Yes.

37 Q. And in addition to the ones at the time——

A. There are 11 which have been closed by us.

38 Q. Does your Department have charge of what is known as the——(interruption)

Mr. Abbott: Mr. Gaines, I think before you le- that subject you should make it clear in the recor- that these banks in receiverships come out of the total banks, that is, in other words these receivership banks are not in addition to the banks taken over.

[fol. 15] 39 Q. Well, just explain: that is, these receiverships have taken place with respect to banks that were being operated by the Commission prior to receivership?

A. Yes.

40 Q. Have any of the banks which have been taken over by you as going concerns been turned back to stockholders?

A. There have been three banks turned back to the original owners.

41 Q. Do the records of your department show whether the stockholders made up the capital stock, or restored it?

Mr. Abbott: I object to that as immaterial.

The Court: He may answer.

Exception.

A. They had to replace the capital stock.

42 Q. Now what do the records show with respect to capital stock?

A. The records show——(interrupted)

Mr. Abbott: Object to that as immaterial.

The Court: Overruled.

Exception.

A. The records show that in each of these three banks a new capital stock was placed in the bank for the purpose of taking out worthless assets and in order to restore solvency.

43 Q. Now, let's see if we have this straight: You are, at the present time, operating 72 failed banks as going concerns?

A. That is correct as of December 31st.

44 Q. And there has been two added since that date?

A. Just a minute; I believe there has been four since that time, either three or four.

45 Q. And then there are 132 receiverships which have taken place since your department took charge of these re- [fol. 16] ceiverships, taken place with respect to banks that were being operated by your Department?

A. Yes, sir, except that sometimes in the past we have not operated a bank but placed it direct into receivership.

46 Q. Then summarizing, state how many banks have failed in the sense that they have either been taken over by receivership or been taken over and run as going concerns since May, 1923?

A. That brings up the question I was unable to answer, as to the number of banks taken over during May and June, 1923.

47 Q. Leave out May and June?

A. From July 1, 1923 up to and including December 31, 1928, there were 230 banks which were closed by the state and put in the hands of the Commission.

48 Q. Do the banks that are taken over by your Department, while they are operated as going concerns, contribute anything to the Guaranty Fund?

A. They do not now. Formerly they did.

49 Q. Does the Department have a record of the amount of the liability of the Guaranty Fund, as evidenced by judgments, certificates or adjudications of the court?

A. Yes, sir.

50 Q. What was the amount of the unpaid liabilities December 31, 1928?

Mr. Abbott: Object to that as not the best evidence, and in that connection have no objection to the witness producing a list of the banks with the approved liability as to each.

51 Q. Under the law, Mr. Witness, whenever there is an [fol. 17] adjudication against the Guaranty Fund is that sent to your office as a part of the public records?

A. The application for adjudication is made from our office and the order certifying the deficiency needed to pay the claims is certified to the Department of Trade and Commerce.

52 Q. So the Department would have a record of that liability rather than your office?

A. We both have.

53 Q. Where do you get your record from?
A. We make application to the court for the order.

Mr. Abbott: There is no objection if you put in the original statement, nor of asking for a statement of the adjudicated liabilities as against each bank.

54 Q. Mr. Peterson, do you have made up a list of the failed banks in receivership and the adjudicated liabilities against each?
A. I don't have that in the form of a list showing only that amount. I have a statement of each receivership which will show that item.
55 Q. If you have the statement, produce it.

Mr. Abbott: We object to that because it doesn't determine the question of the solvency or insolvency of individual banks and doesn't tend to show the conditions of each of the banks.
Mr. Campbell: Intervenors object to this without the basis being in evidence on which he drew his conclusion.

[fol. 18] 56 Q. I withdraw the question from this witness. Mr. Peterson, what are the records as shown by the records of your office with respect to the amount against the Guaranty Fund of adjudicated claims?

Mr. Campbell: I object as immaterial and incompetent, no proper foundation laid.

57 Q. I will ask one more question, Have you the record with you which shows those amounts?

Mr. Abbott: I object as incompetent, no proper foundation laid, immaterial, the document being best evidence.
The Court: Overruled.

Exception.

A. The total is $10,536,518.59 as of December 31, 1928.

Mr. Campbell: Intervenors move to strike answer.
The Court: Overruled.

Exception.

58 Q. Does the amount you have stated include any interest?
A. It does not.

59 Q. And what is the form of the claims, are they in the form of judgments or receivership certificates?

Mr. Abbott: Object as not the best evidence as it assumes one form or the other.

The Court: Sustained.

Exception.

60 Q. Have you in your Department the records which show whether or not these adjudicated claims are in the form of receivership certificates or judgments?

A. We do.

61 Q. Are those voluminous records?

A. Yes, they are.

62 Q. Do you know how much of these adjudicated liabilities is shown in the form of adjudicated claims?

A. The entire total which I gave are adjudicated claims.

63 Q. Do they bear interest on their face?

Mr. Abbott: I object to that as not the best evidence.

The Court: Sustained.

Exception.

64 Q. Are there any receivership certificates outstanding in addition to what you have stated?

A. The Receivership Certificates outstanding are included because the court had ordered it.

65 Q. Do all receivership certificates bear the same rate of interest?

Mr. Abbott: Object to that as not the best evidence.

The Court: Sustained.

Exception.

66 Q. Now, Mr. Peterson, have you made an investigation, either personally or through men in your Department, employed by the State, of the assets and the present value of the assets of the banks now being operated by your Department as going concerns?

A. I have.

67 Q. How did you make that estimate, just explain?

Mr. Abbott: We object to this line of questioning as incompetent and not the best evidence.

The Court: Overruled.

Exception.

A. The list of the assets in each particular bank is classified and the reports have been made on those assets and [fol. 20] the personal knowledge of the various workers in the Department has been used in going over these assets and a valuation placed upon them.

68 Q. What is the total of all liabilities or the amount due depositors, for those banks that are being operated as going concerns?

Mr. Ferncau: Objected to that is incompetent, irrelevant and immaterial, no proper qualification shown of witness to testify.

The Court: Overruled.

Exception.

69 Q. Do the books in the hands of your Department with reference to these show the various amounts due to depositors?

A. They do.

70 Q. Have you made an investigation of your records with respect to these claims?

A. I have.

71 Q. What is the total of those claims?

Mr. Ferncau: Objected to that as incompetent, irrelevant and immaterial.

The Court: Overruled.

Exception.

A. The total on December 31, 1928 was $13,726,441.26.

72 Q. That is the total due depositors from those banks?

A. Yes, in the 72 banks which have not been placed in receivership.

73. Q. Does your office also have a record of the amount due depositors in banks now in the hands of receivers and which have not been adjudicated?

[fol. 21] A. Yes, sir.

74 Q. That is a part of the records of your office?

A. Yes.

75 Q. What is the amount due, receiverships which have not been adjudicated in court?

Mr. Abbott: Object to that as immaterial, incompetent and irrelevant, no proper foundation laid.

The Court: Overruled.

Exception.

A. The total is $2,133,627.54.

76 Q. Now what is that from?

A. That total is the amount of deposits in banks which are in receivership and which the court has not passed on the claims as yet.

77 Q. That is, the amount of the going concerns is $13,726,441.26, those were your figures?

A. Yes.

78 Q. And the amount that is due depositors from the receiverships which haven't yet been adjudicated as liabilities is two million, one hundred thousand and something?

A. $2,133,627.54.

79 Q. Now, Mr. Peterson, in this compilation of the total liabilities is the sum of $12,559,871.13. That is taken from your books; what is the significance of that figure?

A. That is the amount of adjudicated claims plus those not adjudicated.

80 Q. That is, you include—so that would make total liability against the Guaranty Fund, including adjudicated [fol. 22] claims and not adjudicated of what amount?

Mr. Abbott: Object to that as immaterial and incompetent, object to classifying all claims.

The Court: Overruled.

Exception.

81 Q. (continued): As shown by your books?

A. The total is $26,400,282.76.

82 Q. That is what your books show as present liabilities against the Guaranty Fund?

A. Yes, as of December 31, 1928.

Mr. Abbott: I object to the question as leading and move to strike out answer. On the face of it it is an error, you don't mean against Guaranty Fund.

The Court: Motion to strike out the answer is overruled.

Exception.

83 Q. In these banks being operated as going concerns and in the receiverships too, there are certain assets as shown by the books of your Department, are there not?

A. Yes, sir.

84 Q. Who has charge of the realization upon these various assets?

A. I have been in charge of the realization.

85 Q. Have you made a careful investigation of the value of those assets?

A. I have, so far as it has been physically possible for me to do so.

86 Q. What do you mean by that?

A. I mean it would be impossible for me to go over each [fol. 23] asset. Those under myself and those under my direction have gone over these; I couldn't testify I had done so personally.

87 Q. And what is the amount you anticipate will be realized from these assets from the banks under your charge and under receivership?

Mr. Abbott: I object as incompetent and immaterial and linking up those banks in receiverships and banks that are still in operation; and further that there is no foundation shown and on the contrary, lack of foundation shown. This witness has not shown that either himself or these assistants are qualified to pass upon the value of the various kinds of assets and he has not even described the various kinds of assets.

88 Q. Now, what are the nature of the various assets as shown by the records of your Department?

A. They consist of notes, overdrafts, real estate, judgments and various other assets which we class as other assets. The notes, overdrafts, real estate and judgments are the large portion.

89 Q. State the method used in attempting to arrive at the value it will be given in the Guaranty Fund?

A. By going over each asset and the personal knowledge of the man in the Department of those particular assets.

90 Q. And have you been using that method for considerable time?

A. For the past six years.

91 Q. What has your experience shown with reference [fol. 24] to the accuracy of that method?

A. We have been able to very approximately fix the losses.

92 Q. And the same fact has been apparent wherever you have made your comparison?

A. Yes.

93 Q. Would you say the result of your estimates have been accurate?

A. Yes, sir.

94 Q. Now, Mr. Peterson, in your judgment, what will be realized from the various going concerns and (interrupted)

Mr. Abbott: Object as no proper or sufficient foundation laid, no qualification shown.

The Court: He may answer.

Exception.

A. Total, $10,451,932.65.

95 Q. What is the amount, or will be the amount, of the deficit against the Guaranty Fund as shown by the records of your office to December 31, 1928?

Mr. Abbott: Object as no proper or sufficient foundation laid, no qualification shown.

The Court: Let him answer.

Exception.

A. $15,948,350.11.

96 Q. Does that take into consideration any bank that may be turned over to you in the future?

A. It does not.

97 Q. Does that take into consideration all the banks now in your control?

A. No, sir. Only those that were on December 31, 1928.

98 Q. Has it been the experience of the Department that when a bank is taken over it adds to the amount of the [fol. 25] deficit in the Guaranty Fund?

A. Yes, sir.

99 Q. Do you make an investigation of the various banks taken over by your Department as to what extent the capital is impaired before taking over?

A. Yes.

100 Q. What is the result of your investigations in that line?

Mr. Abbott: Object as incompetent and immaterial.

The Court: Overruled.

Exception.

A. The capital has been absorbed through bad loans and losses to the extent of about six times the capital of the bank.

Mr. Abbott: I move to strike out answer as conclusion of the witness, no sufficient foundation laid.

The Court: Motion overruled.

Exception.

101 Q. That impairment applies to the time the bank was taken over?

A. At the time the bank was closed.

102 Q. Just explain a little more in detail your answer as to the method by which you arrive at the extent of the impairment of capital?

Mr. Abbott: Object as no qualification shown, calling for mere conclusion of the witness.

The Court: You may answer.

Exception.

A. The loss existing in the bank would be on an average approximately six times the amount of the capital of that bank.

Mr. Abbott: Move to strike the answer as conclusion of the witness and immaterial.

The Court: Motion overruled.

Exception.

[fol. 26] 103 Q. I hand you a paper marked Exhibit 1, and ask you who prepared it, if you know?

A. I prepared it.

104 Q. Is that a copy of the records of your office?

A. It is.

105 Q. State what it shows?

A. It is a statement of the assets, of liabilities and expected realization of all of the trusts in the hands of the Guaranty Fund as of December 31, 1928.

106 Q. We offer in evidence Exhibit 1.

Mr. Abbott: Object as immaterial, incompetent and no proper foundation laid.

The Court: Overruled.

Exception.

Exhibit 1 received in evidence, attached to and made a part of this Bill of Exceptions appearing at page 65 hereof.

Cross-examination:

Examined by Mr. Abbott for the State:

107 Q. Referring to Exhibit 1 you state this is a copy of your records. Under the column headed "Expected Realization" that was made up from various sources, obtained from records and certain matters taken into consideration independent, of any written records in your office, isn't that true?

A. No. They have been made up from Department records in our office.

108 Q. In your estimate of values you testified you took not only the records in your office but the individual knowledge of the officers of your Department as to their respective proper values?

A. That is true.

109 Q. Now you have testified you expect to realize $10,-
[fol. 27] 451,593.65 out of these assets but you haven't testified as to the book value in your office of the assets. Now is the amount stated on this Exhibit 1, "Book value, $39,-531,605.93" the book value of the assets in your Department?

A. Yes, sir.

110 Q. Then you figure you will realize about 25¢ on the dollar out of the assets?

A. Yes, sir, approximately.

111 Q. That is one-fourth of what you carry them on the books at?

A. Yes, sir.

112 Q. Now take the last item in the list here, "70 Sale Assets," book value $4,089,148; expected to realize, $193,571, or about 5%. You may explain what you mean by "70 Sale Assets".

A. The term "Sale Assets" is a term we use in the office to designate those assets purchased by the Guaranty Fund Commission at public sales ordered by the court and held by the receivers of the various banks.

113 Q. And at such sales the receivers attend and bid in the assets in bulk?

A. Yes, a representative of the Commission.

114 Q. Usually in bulk?

A. Yes.

115 Q. And usually without competition?

A. Sometimes are, sometimes not.

116 Q. Very seldom?

A. That is possibly true but I couldn't testify as to that. [fol. 28] 117 Q. As to this figure that you expect to realize, $193,571; how do you arrive at that figure?

A. That is the amount which was paid for these bid in assets at those public sales, plus cash on hand realized from other assets.

118 Q. Now then, what has been the experience of your department as to that kind of assets in realizing upon them, in the amount you receive from the assets as compared with what you had paid for them at the sale?

A. I think they would run right close to 70% or 100% more than we paid.

119 Q. Then, based on your experience they should bring double what you have in them?

A. No, because you would have your expenses to take out.

120 Q. Less expense, it should produce double?

A. Yes, sir.

121 Q. Then I take it, Mr. Peterson, that in arriving at these figures you have been quite conservative in your values?

A. We have——(interrupted)

122 Q. Answer "yes" or "no."

A. I can't answer "yes" or "no" because that question was "quite conservative." In all estimates we place we try to place safe, conservative figures, neither too high nor too low, on what may be expected to be realized from the assets.

123 Q. Now, included in these assets aggregating thirty-nine and a half million dollars, book value, you say you have included some real estate. Can you tell us the aggre- [fol. 29] gate of this real estate, Mr. Peterson?

A. I can.

124 Q. What is that amount?

A. $6,161,109.05.

125 Q. And in valuing that real estate and referring to your basis of valuation how have you now valued it as compared with how you were valuing real estate say, a year ago?

A. It is probably ten to fifteen per cent less than it was a year and a half ago.

126 Q. Can you testify you have marked your valuation of real estate down ten or fifteen per cent or in the neighborhood of a million to a million and a half of what you would have marked it in a similar statement a year ago?

A. Probably three-quarters of a million.

127 Q. Three-quarters of a million. In other words, if you had valued this same real estate at this time on the basis that you would have valued it a year ago it would have been three-quarters of a million higher?

A. It would have been that a year and a half ago.

129 Q. Now, in arriving at the same valuation of your assets what other elements, if any, entered into it, as to probable realization?

A. I don't think there are any other elements, except just present conditions.

129 Q. What do you mean by that?

A. Our experience proves to us that conditions with respect to the sale of real estate are not nearly so good as [fol. 30] a year ago. I think that the failure of the Guaranty Fund to function properly and conditions generally caused depreciation in all our assets as well as assets not owned by us.

130 Q. And what elements, Mr. Peterson, might cause these assets to bring a substantially larger amount?

A. In my opinion if the banking situation was stabilized and general conditions stabilized they would bring more money than we have estimated.

131 Q. You mean by Legislation?

A. I think that would help very materially.

132 Q. And to what extent, Mr. Peterson, would you add to your "expected realization" in view of stabilizing legislation?

Mr. Gaines: Object as calling for opinion he is not competent to give.

The Court: He may answer.

Exception.

Mr. Gaines: If your honor please, there is no assumption of legislation in the future.

A. I am afraid I will have to assume something in answering. I would say if some arrangements would be devised through legislation whereby depositors of failed banks would be paid in full and the banking business placed on a profitable basis which would stabilize general conditions, that I would add from ten to fifteen per cent to the amount which might be realized from the assets now in our hands. Probably I should qualify that; on part of the assets it would make a difference of two or two and a half [fol. 31] millions but that is only assuming general conditions would be made good.

133 Q. These assets which you refer to, Mr. Peterson; of course a part will come from the banks of the state banking system. In arriving at your figures has there been any element therein of the attitude that the banks themselves have taken toward the Guaranty Fund:

A. You mean recently or generally?

134 Q. Recently, yes.

A. Possibly and quite probably. I presume you refer to the bringing of this suit.

135 Q. As whether that has affected the value of these assets?

A. That probably has some small part in the making of conditions which exist to-day.

136 Q. Then if the liability of the banks for these special assessments is removed, what in your judgment if any

effect would that have on the values that you estimated for these assets,—that is the realization value of the assets, in your judgment?

Mr. Gaines: Objected to as speculative.
The Court: Overruled.

Exception.

A. I want to thoroughly understand your question. Your question was if the liability of the banks for the special assessment is entirely removed——

137 Q. By legislative or court action whether, in your judgment, what would be the effect in values as realized from these assets?

A. I doubt if it would make a good deal of difference [fol. 32] because the payment of the special assessment is not a large enough item to make any great difference.

138 Q. I mean the effect of it, the effect upon the market value of the assets? I made inquiry of you yesterday, did I not, as to what effect it would have upon the assets?

A. You coupled with that another,—the failure of the Legislature to provide any remedial legislation. In answer to that I said I thought it would depreciate the value of these assets still further. The action of the Legislature is a larger force in the stabilizing of banking conditions than the paying of the special assessments by the banks.

139 Q. In what amount, Mr. Peterson?

A. That would be very hard to say.

140 Q. Will you estimate it as much as $200,000.00? Then we get to this, Mr. Peterson, that in your judgment it deprives the depositors in failed banks of any recourse through special assessments or any other provision for their claims and deposits and would provide a situation that would reduce the assets two millions?

Mr. Gaines: Objected to as purely speculative.
The Court: Overruled.

Exception.

A. That would be very hard to foretell what might be the result but in my judgment, based on my experience, if those conditions were to occur general and banking conditions would be unsatisfactory and the results would be a further depreciation of these assets as well as other assets

[fol. 33] owned by these interests.

141 Q. Now, Mr. Peterson, in the matter of the total liabilities of these banks you made or you stated that the total liabilities to depositors was $26,400,282.00. Now then, half of that, or $13,726,000.00 is in going concerns, going banks?

A. Yes, sir.

142 Q. Now, no part of that has yet been handled through claims against the Guaranty Fund or by adjudication as payable through the Guaranty Fund?

A. Not been adjudicated by any court as yet.

143 Q. And those banks have, as you estimated, assets that will pay about 40% of that; take the first item on your exhibit, approximately?

A. Yes, it would be, approximately.

144 Q. Then it would be reduced that amount that would ultimately be charged against the Guaranty Fund?

A. Yes, sir.

145 Q. In order that there may be no confusion, this item on Exhibit "A," "70 Sale Assets," that doesn't refer to seventy independent banks, does it?

A. No, it does not.

146 Q. In fact, it refers to assets growing out of banks that are enumerated in other items on the list?

A. Yes, sir.

147 Q. Now, you stated that the average impairment in closed banks was six times the capital stock; now would that apply to receiverships? You speak of receivership [fol. 34] banks? As to going banks you do not yet have any basis for computation?

A. The basis we have arrived at is through the losses of banks, the valuation we have placed on the assets, in estimating the loss or deficit in each particular bank.

148 Q. You estimate that the ultimate loss in banks closed out will approximate six times the capital stock?

A. That is about true in 276 banks which we have handled.

149 Q. You do not mean to state, Mr. Peterson, that at the time your department took over the particular failing banks that there was that impairment, but that that ultimate loss occurred by reason of not only the conditions before it was taken over but by reason of taking over and on account of liquidating?

A. The liquidating loss.

150 Q. As a matter of fact, Mr. Peterson, most solvent banks, if taken over by your department would sustain a large if not an entire capital loss, or more, by the very fact of being closed out in that manner. In other words assets that are good for going banks, by the mere fact of closing, shrink?

A. In the average bank it would probably absorb the capital.

151 Q. You didn't intend to carry the idea, as might be implied, from your answer that the capital of these banks was impaired to that extent at the time of the taking over?

A. No. The liquidating loss to the Guaranty Fund is six [fol. 35] times the capital stock of the bank.

152 Q. What amount of receivership certificates were outstanding December 31, 1928?

A. $151,871.38.

153 Q. And where were those receivership certificates located or by whom held?

A. They were held largely by state bankers in Nebraska.

154 Q. How many different banks in Nebraska held those receivership certificates? And in what amount?

A. I can't answer from the records I have here.

155 Q. Will you kindly make a note and give us this data?

A. This one hundred fifty-one thousand dollars?

156 Q. Yes.

A. You want the number of the banks and the amount and list of the banks?

157 Q. Yes. Now, in the operation of your department do these receivership certificates take priority over other claims against the Guaranty Fund?

A. No, sir.

158 Q. In the payment?

A. They do because they have been certified to the department prior to depositors' claims; yes, they have priority of payment.

It now being 12 o'clock noon, adjournment was taken until 1:30 o'clock P. M. of the same day.

[fol. 36] 1:30 o'clock P. M. January 28, 1929, Court convened pursuant to adjournment and the following proceedings were done and had, to-wit:

159 Q. Now, Mr. Peterson, how many banks or rather, in how many banks have the depositors been paid out in full under the operation of the Guaranty Fund Law?

A. 130.

160 Q. What is the total number of banks that have been taken over or come into receivership,—anyway that have been closed, since the enactment of the Guaranty Fund Law.

A. 269 up to and including December 31, 1928.

161 Q. Now, of that 269 banks in how many banks have the depositors been paid out in full?

A. 130.

162 Q. That is, depositors in 130 banks that have been taken over have received their deposits in full?

A. Yes.

163 Q. Then, that leaves 139 banks still unclosed, of the 269 you have taken over?

A. Yes, that leaves 139 whose liabilities are unpaid.

164 Q. Now, have the depositors in a portion of those banks received a portion of their deposits?

A. Yes, in practically all of them.

165 Q. And the residue of liabilities that you testified to here as liabilities are the remaining liabilities in those banks?

A. Yes, sir.

166 Q. And of the 139, in order that the record may be clear here how many of the 139 are in receivership with adjudicated claims?

A. It will take a few minutes to answer that question.

167 Q. Mr. Peterson, if it is going to require a compilation we can pass it along.

[fol. 37] A. 57.

168 Q. And that would leave a remainder of 82, wouldn't it?

A. There are ten receiverships in which claims have not been adjudicated.

169 Q. Of the remaining 82?

A. Could I make a full statement of that?

170 Q. Yes, go ahead.

A. Of the 139 banks in which depositors have not been paid in full, 57 of that number are in receiverships with the claims adjudicated. 10 are in receiverships in which sufficient time has not elapsed for the adjudication of claims.

171 Q. Now in the disbursement of the assessments or the funds raised by these assessments, have you been paying interest on them or just paying the face of the claim?

A. We have only paid the face of the claim except in a few instances where claims have been in litigation in the Supreme Court.

172 Q. It has been the policy of the Department that claims did not bear interest?

Mr. Gaines: Objected to as calling for conclusion and immaterial and incompetent.

The Court: Sustained.

Exception.

173 Q. Mr. Peterson, you have testified here as to the value of these assets. Have you made compilations and estimates heretofore and within the present year as to the value of the assets and published same in pamphlet form?

A. Not within the year, no.

[fol. 38] 174 Q. When did you do that?

A. I think the last statement given out was in May, 1927.

175 Q. How many other statements have you prepared and printed with respect to the valuations?

A. I only remember of one other that was published.

176 Q. And in these compilations that you made have you given the number of the banks, book value of assets and your estimate of the assets?

A. I did, particularly for the Governor in May, 1927 for a committee appointed by him.

177 Q. Will you produce one of those pamphlets, or can you?

(Witness produces pamphlet.)

178 Q. Mr. Peterson, have you printed from time to time a pamphlet or a series of pamphlets with your computations in as to the value of the assets, or your estimate of their value?

A. I can only remember doing that one time and that was at the close of the fiscal year, 1927. That was the fiscal year 1926, I believe, contained the valuation but the 1927 report which Mr. Hotz has there did not have an estimate of values.

179 Q. As Secretary of the Guaranty Fund Commission did you prepare for the fiscal year ending June 30, 1927, a

report of its operation and data and figures and records of your department?

A. I did.

180 Q. Handing you Exhibit 2 I will ask you to state whether that is one of the reports which you prepared [fol. 39] from the records of your office?

A. Yes, sir.

181 Q. And is that a correct reflection of the records of your office as to the matters therein contained?

A. Yes, as of that date.

Mr. Abbott: We offer in evidence Exhibit 2.

Mr. Gaines: I want to object to the offer of the Exhibit as a whole for the reason it gives the office personnel and a lot of statements, statements concerning records of trust; the record should be confined. This is a book containing 51 pages,—ought to be confined to matters in reference to state banks.

The Court: You can ask on anything to be brought out, but not offer the book as a whole. Objection sustained.

Exception.

182 Q. Calling your attention to the compilation on pages 4 and 5, "Condensed statement of all Trusts as of June 30, 1927" you may state whether or not that is a statement of the condition of, or you may state whether by "Trusts" you refer to the state banks then under your jurisdiction?

A. Yes, sir.

183 Q. And is that a correct statement of their condition as of that date?

A. Yes, sir.

184 Q. Challenging your attention to page 11 and the top portion of page 12, entitled "Consolidated Statement of Fifty-Seven Going Concerns" is that a correct statement of the condition on June 30, 1927, of the 57 banks then [fol. 40] under your control?

A. Yes, sir.

185 Q. And to page 18, "Consolidated Statement of Forty-Eight Old Receiverships," is that a correct statement of the receiverships as of that date?

A. Yes, sir.

186 Q. And calling attention to pages 33, 34, 35, 36 and 37 headed "Realization of Assets and Liquidation of Lia-

bilities in Trusts Under the Management of the Guarantee Fund Commission for year Ending June 30, 1927," is that a correct statement of the matters therein contained?

Mr. Abbott: We offer the identified pages in evidence as a part of the cross examination.

Exhibit #2 is received in evidence, attached hereto and made a part of this Bill of Exceptions at page 66 hereof.

187 Q. Calling your attention to pages 14 and 15 of Exhibit 2 entitled "Consolidated Statement of Seventy-Three New Receiverships" as of June 30, 1927, is that correct?

A. Yes, sir.

Mr. Abbott: We offer these pages as a part of the cross-examination.

Mr. Gaines: We object on the ground that it is a condition of the fund one and a half years ago; just an array of facts and figures, doesn't go with present conditions; that [fol. 41] is what we are talking about and examining about. This is a year and a half prior to that.

The Court: Objection overruled.

Exception.

188 Q. Now, Mr. Peterson, do you have a similar report for the period ending June 30, 1928?

A. I have in our own records, yes; however, it is not compiled in the same form but we have the same record.

189 Q. That is, in typewritten or written form?

A. Typewritten form.

190 Q. Will you kindly produce it?

A. I do not have it with me. I have that same report as of December 31, 1928, with me.

191 Q. I think you testified the fiscal year ended June 30th?

A. Similar records are prepared at the close of the calendar year.

192 Q. I would like to have the annual report as of the fiscal year. I would like to have the entire reports so that we may select such reports——

A. It would be a book bigger than that if you want to go into all the details.

193 Q. I suggest that you produce it and we will see how little I can get along with. Now, Mr. Peterson, prior to

luncheon you referred to the average losses of these banks in liquidation being an amount equal as a general thing, to six times the amount of the capital stock and stated that those losses were made up of bad debts and other items. Now you may state what you mean by bad debts in those banks?

A. In place of using the term "bad debts" I would say [fol. 42] notes which are uncollectible or uncollectible in full; overdrafts which are uncollectible, either in full or in part; real estate carried on the books at more than the cash value and other assets of a similar nature which of course as a general term I would classify them, "bad debts."

194 Q. To what extent does the item "real estate" enter into it?

A. We have realized on practically four and a half millions of real estate, book value, since I have been in the office. The average book realization has been 42% of the total of the book value.

195. Q. And the book value, I take it, would be based on the value over and above any incumbrances there might be on it?

A. The book value represents the equity only, and it is 42% on the value of that equity which we have realized.

196 Q. In practically every instance where you have taken over failed banks the interest of the bank in real estate has been an equity, there has been a first mortgage ahead of it?

A. That is usually true.

197 Q. And has another large item of loss in these banks been second mortgages on real estate?

A. Yes.

198 Q. To what extent has second mortgages entered into the calculations?

A. I would be unable to give you even an approximate answer to that.

199 Q. To quite a large extent?

A. I wouldn't attempt an answer because I have never [fol. 43] kept that classification except in the liquidation of trusts.

200 Q. Well, in connection with these bad debts arising through real estate and second mortgages you are familiar, from your experience with your Department, as to the cir-

cumstances under which the banks acquire that particular class of paper, generaly speaking?

A. Yes, sir.

201 Q. You may state what the facts are, in that connection.

A. We usually find that before the deflation period set in a bank would be carrying a person for a line of indebtedness, sometimes secured and quite often unsecured. When the particular security became insufficient and property values as a whole depreciated the banker would take any security he could get. Quite often that would be a second mortgage and quite often a third mortgage, to protect himself. Consequently they are not taken as security to the original loan but to the loan already made.

202 Q. You may state what you mean by "deflation period"?

A. We say the deflation period following the war, began in 1920 and continued through 1921 and up to 1922.

203 Q. You refer, Mr. Peterson, to the deflation through the years 1920, 1921, and 1922. Now what had immediately preceded that period that produced the situation, that gave rise to the situation?

Mr. Flansburg: Objected to as not proper cross examina-[fol. 44] tion, calling for conclusion and opinion of the witness.

The Court: Sustained.

Exception.

204 Q. Mr. Peterson, you testified here to the book value of the assets being $39,531,000.00. Whose books are you referring to?

A. Those values are the values at which these assets were carried on the books at the time the bank was taken over, which value we continue on the receivership books.

205 Q. Now you testified that the present value of those assets is approximately $10,451,000.00, or 25%? Can you tell us when and under what circumstances that disparity in values occurred, or arose?

A. No, I could not.

206 Q. Did that always arise prior to the taking over of the banks, receivership banks, and by reason of their going into liquidation?

A. Yes.

207 Q. And a certain percentage is largely what we call shrinkage, on account of being put in liquidation?

A. Yes, some portion of it.

208 Q. Now, as to the shrinkage or disparity in values between the book value and the present value in the main; you may state when that occurred, so far as the banks are concerned.

A. I would be unable to answer that definitely because the loss occurred over a period of years.

209 Q. But from your experience and your familiarity [fol. 45] with their assets when would you say this disparity between the book value as carried by the banks and the present value largely occurred?

A. During the past seven or eight years.

210 Q. And what portion of that seven or eight years?

A. To answer that anywhere near correct I would have to go through the adjudicated banks.

211 Q. Just your general opinion.

A. Presuming the banks included are banks existing ten years ago, then I would say the majority occurred during 1920, 1921 and 1922.

212 Q. And the deflation period thereafter?

A. No, I would call that the deflation period.

213 Q. Now, then, Mr. Peterson, as far as your familiarity goes and referring to the 269 banks that have been closed and your familiarity with them, what percentage of those banks would you say lost their capital and failed through the deflation that resulted immediately following the war?

Mr. Flansburg: Object as calling for conclusion of the witness.

The Court: Overruled.

Exception.

A. The very large portion of, perhaps seventy-five per cent of these banks incurred these losses, which afterwards wiped out their capital and became apparent, during the years preceding 1923, probably the five years preceding 1923.

214 Q. By reason of the deflation?

A. Yes, sir.

215 Q. Mr. Peterson, prior to becoming identified with [fol. 46] the Guaranty Fund Commission you were in the banking business, were you?

A. Yes, sir.

216 Q. For how long a period?

A. I have been in the banking business since 1905.

217 Q. Is there, in the banking business, any date with reference to the normal loss of banks through bad paper, that is the average of loss, what might be expected, a fair percentage of loss as compared with loans and discounts?

A. I believe certain writers on economics set out those percentages.

218 Q. Are you familiar with those percentages?

A. No, I cannot say.

219 Q. From your experience as head of the Guaranty Fund Commission and as a banker you have an opinion based on your experience and observation and the date you have gone over, you observed what the normal loss should be?

Mr. Flansburg: Objected to as calling for conclusion and no foundation laid.

The Court: Overruled.

Exception.

A. I did not.

220 Q. Mr. Peterson, do you have present with you in court a list of the banks in the hands of the Guaranty Fund Commission, being operated by it, that are not yet in receivership?

A. Yes, sir.

221 Q. You may refer to the list and state whether the First State Bank of North Bend is in that list?

[fol. 47] A. Yes, sir, it is.

222 Q. And in connection with the aggregate figures you gave this morning do you have the net losses in that bank which, in your judgment, will become a charge against the Guaranty Fund?

A. Yes, sir.

223 Q. And what is the amount of the net losses?

—. $100,000.00

224 Q. And that is the net loss to the depositors, is it?

A. Yes, sir.

225 Q. And as compared to deposits, what loss on the dollar is that?

A. It would be approximately 31%.

226 Q. Loss?

A. Yes.

227 Q. On the remaining unpaid deposits or on the aggregate deposits that the depositors had in, or on that part that is unpaid as it stands today?

A. The unpaid deposits are approximately $325,000.00 on which there will be $100,000 loss, or approximately 31%.

228 Q. Referring to the Farmers State Bank, of Rosalie, you may consult your records and state the value of the remaining assets of that bank?

Mr. Flansburg: Move to strike as not cross examination.

The Court: Sustained.

Exception.

229 Q. You will be available throughout this trial?

[fol. 48] A. So far as I know.

230 Q. Prior to luncheon you were asked to produce a certain list. Is that prepared yet?

A. It is not ready yet; it will be some little time.

231 Q. There seemed to be some variance of the aggregate court claims allowed between your figures and Mr. Bliss'. Those arose out of the fact that some payments are made in your Department that he is not familiar with?

A. In all probability there would be a difference on that account.

232 Q. Have you prepared a statement of those payments not yet reported to him?

A. No.

233 Q. Calling your attention to Defendant's Exhibit No. 3 "Statement of Receiverships," "Of Receiverships On Which Depositors Have Not Been Paid" are you familiar with that list, have you seen it before?

A. No, I have not seen it.

234 Q. Do you not have a copy?

A. Not to my knowledge.

235 Q. Will you kindly take that list and indicate, not

now but let me recall you later, and state wherein there has been any payments made on the amount of court orders allowed in these various receiverships?

A. I will.

236 Q. Handing you the sheet, Exhibit 4, which you produced a few minutes ago, being a consolidated statement of the assets and liabilities of the Guaranty Fund, is that a [fol 49] correct statement as of the date of this sheet? Are you familiar with the upper part of it?

A. Yes, sir.

237 Q. Is that a correct statement?

A. It is.

238 Q. As of May, 1927?

A. Yes, sir.

239 Q. One further question, didn't you prepare this entire exhibit, Mr. Peterson, that you have in your hand?

A. You mean the copy for mimeographing?

240 Q. Yes.

A. Yes.

Mr. Abbott: We offer in evidence Exhibit No. 4, entire.

Mr. Gaines: Before the offer is received I want to interrogate the witness.

By Mr. Gaines:

241 Q. Mr. Peterson, at the bottom of that statement it contains the following: "As of the same date Secretary Bliss of the Department of Trade and Commerce submitted a report covering the 820 Banks under his supervision. He divided these into six classes, as follows:" Now the statement contained in the exhibit as of the data prepared by Mr. Bliss, did you have anything to do with that data?

A. I did not.

By Mr. Abbott:

242 Q. So why did you include Mr. Bliss' statement with yours?

A. The Exhibit you have there was prepared and used by [fol. 50] Mr. Bliss and myself in attempting to finance the Guaranty Fund at the particular time, based on those figures. And I included my report along with his. A

copy of the figures which both Mr. Bliss and I submitted to the bankers' committee.

243 Q. That is, a copy submitted to the Governor?

A. Yes.

244 Q. And submitted as your report to this Committee?

A. No, I had the top portion.

245 Q. Mr. Bliss joined in preparing and submitting the report to the committee appointed by the Governor?

A. The two reports were submitted separately to the committee. The committee worked out a proposed plan of financing and in order to transmit this report to the various men, in attempting to sell receivers certificates, at that time this was prepared and sent out.

246 Q. And your judgment would be, would it, that it went out as correct?

A. Yes.

Mr. Abbott: We offer in evidence Exhibit 4.

Mr. Gaines: No objection.

Exhibit No. 4 is received in evidence, and same is attached hereto and made a part of this Bill of Exceptions at page 67 hereof.

247 Q. Mr. Peterson, did you transmit to the Guaranty Fund Commission a report signed by you as Secretary under date of January 22, 1927, giving the results of an audit of the Guaranty Fund for the period preceding that date?

A. That is not in reference to an audit, that is simply [fol. 51] a report from me of an audit made by ourselves. It is in fact a similar report to the one identified for a year later and I believe this report carried valuations as of June 30, 1926.

248 Q. And is this Exhibit No. 5 the report to your commission of your audit?

A. Yes, sir.

Mr. Abbott: We offer Exhibit No. 5 in evidence.

249 Q. Was it true and correct of that date?

A. To the best of my knowledge.

Mr. Gaines: We object to the offer on the ground it is a reflection of conditions in 1926, two years prior to the date of this suit. Not cross examination for the reason we agree on these totals.

The Court: Overruled.

Exception.

Exhibit No. 5 received in evidence and same is attached hereto and made a part of this Bill of Exceptions at page 68 hereof.

[fol. 52] By Mr. Campbell for intervenors:

250 Q. Mr. Peterson, has anyone besides yourself prepared any other such audit?

A. No, sir.

251 Q. Has anyone beside yourself prepared an estimate of valuation?

A. I presume you mean the commission or the officers?

252 Q. I mean the commission or yourself.

A. None made outside of the commission and its office force.

253 Q. The depositors have never participated in making those estimates of valuation?

A. No, not as a general rule; probably in a few instances.

254 Q. You stated that of these 269 bank failures, in your opinion approximately 75% resulted from deflation immediately following the war. I will ask you if, of the remaining 25% inefficiency and incompetency in management and administration was a factor?

Mr. Gaines: Object as calling for conclusion.

The Court: Overruled.

Exception.

A. You are opening up a big question there. The making of a loan back in 1920 which resulted in a loss in years to come.

255 Q. Was perhaps poor judgment and various other things, coupled with the deflation as you refer to it?

A. There was bound to be a lot of poor judgment and inefficiency; probably not half the banks would have been closed if there had been no inefficiency on the part of *of* [fol. 53] the bankers of these banks that did afterwards close.

256 Q. Of this twenty-five per cent that you would not charge against the deflation period would you say that in-

competency and inefficiency was a factor in causing their failures?

A. I appreciate that there are several of these banks in this list, possibly some organized since 1922 and some of the losses that have occurred since 1923 was poor management and throwing good money after bad and from other causes that might have occurred since that time, since 1923. But the majority of the losses resulted from loans made prior to 1923.

257 Q. Just what do you mean by deflation, to get the definition?

Mr. Gaines: Object as repetition.
Mr. Campbell: I presume it is. That is all.

Redirect examination.

By Mr. Gaines:

358 Q. You state that in your opinion quite a considerably larger sum would be realized out of those assets if conditions were changed so that these depositors in failed banks would be paid in full?

A. Yes, sir.

259 Q. Would that same condition arise if the people who lost money in land would be paid in full?

Mr. Abbott: Object as argumentative.
The Court: Overruled.

Exception.

[fol. 54] 269 Q. That is, it would add about twenty millions dollars to people who now have apparent losses?

Mr. Abbott: Objected to a- argumentative.
The Court Overruled.

Exception.

A. (No answer.)

261 Q. Now, would the payment, or the payment by the banks of this particular assessment now in controversy materially affect the value of the assets now in the hands of the Commission, one way or the other?

Mr. Abbott: Objected to as calling for conclusion, object to the words, "would materially affect".

The Court: He can answer.

Exception.

A. I don't think it would affect, to any extent, because the amount of money, in relation to the total indebtedness, would be so small as not to make much difference.

262 Q. Calling your attention to exhibit 5, prepared by you as Secretary, was it sent to the public, or to anyone who inquired for it?

A. Both, sent out to the public and give to people who inquired for it.

263 Q. Calling your attention to page 4 of the exhibit, under "Valuation of Assets as of June 30, 1926" you took the valuation as prior to June, 1926 and as of that date?

A. Yes, sir.

264 Q. What was stated as the amount that would have to be raised for the Guaranty Fund by assessments from banks as of that date to pay up the deficit?

[fol. 55] A. This statement does not give that.

265 Q. What is the significance of the figure, $2,715,-999.12, what does that mean?

A. That is the difference between the total liabilities as against the assets.

266 Q. That is the total liabilities of that date were $13,-252,273.26 and you estimated you had on hands in these failed banks assets amounting to a cash value of $10,536,-274.14, which left a deficit of $2,715,999.12, didn't it?

A. Yes, sir.

267 Q. But against that would be applied the realization upon the contingent stockholders' liability?

A. The deficit at that time would not be $2,715,999.12.

268 Q. So that at that time information was given to the bankers that there would be no deficit in the Guaranty Fund?

Mr. Abbott: Objected to as argumentative, incompetent, irrelevant and immaterial.

The Court: Overruled.

Exception.

A. The item, $3,588,284.07 is the book value of stockholders' liability. Ordinarily we figure that about 20% of that is collectible. On that basis we would figure a realization of $700,000 out of the stockholders' liability, which would leave a deficit of two million in the Guaranty Fund as of June 30, 1926.

269 Q. Handing you exhibit 4 I notice the top part is a part of the report submitted by Secretary Peterson of the Guaranty Fund Commission to the Committee of bankers [fol. 56] appointed by Governor McMullen to investigate the condition of the Guaranty Fund. Were you present at that meeting?

A. Yes, sir.

270 Q. Was this report submitted at that time?

A. No, sir.

271 Q. Was it submitted at a later date?

A. Yes, sir.

272 Q. Do you remember when this report was submitted to that committee of bankers?

A. Very soon after May 17th.

273 Q. Do you remember the names of the bankers present? Was Mr. Schantz there?

A. Yes, sir. Mr. Schantz was not chairman, Mr. McCloud of York was.

274 Q. Was Mr. Stephens present?

A. Yes.

275 Q. Now, at that time was the bankers asked to underwrite the loss in the Guaranty Fund?

A. Yes.

276 Q. And what was said as to the utmost liability of the Guaranty Fund, as of May 17, 1927, that the bankers would be required to raise?

A. There was an approximate liability of $6,179,390.31 in the banks which were in the hands of the Commission and Mr. Bliss was reporting a loss of approximately $1,118,000 in banks that had to be taken over, making a total of approximately $7,300,000.

277 Q. That is the loss from the banks now in the hands [fol. 57] of the Guaranty Fund Commission, plus the loss in banks it was apparent would have to be taken over, made a total of something over seven million, was it not?

A. Yes, sir.

278 Q. And that was the report given to the bankers in May, 1927?

A. Yes, sir.

279 Q. And how is that compared to the present situation, showing a net loss existing of fifteen millions?

A. Yes, sir.

280 Q. And the present deficit doesn't take into consideration any losses that will occur in future, at all?

A. No, sir.

281 Q. Would you be able to estimate as to what the losses will show in the future?

Mr. Abbott: Objected to as no proper question, calling for conclusion and no foundation laid.

282 Q. Have you given any study as to the ultimate deficit in the Guaranty Fund?

A. I can't say that I have, no particular study, no.

283 Q. Did you furnish to the Governor the data which is contained in his report to the Legislature?

A. Not directly, no.

284 Q. Were you consulted or do you know the source from which he obtained his facts?

A. No, I don't know the source.

285 Q. Now, on these failed banks that came into the [fol. 58] control of Guaranty Fund Commission what has been the average amount realized from the liquidation of the real estate as compared to the amount at which it was carried?

Mr. Abbott: Objected to as having been answered.

The Court: He may answer.

Exception.

A. Approximately 43%.

286 Q. That is, taking the real estate on the book value, it brought about 43% of the value?

A. Yes, sir.

287 Q. Now, of course, you have a large amount of real estate still on hand?

A. Yes, sir.

288 Q. Is that real estate which has been sold that which has the higher value?

A. I don't think any particular class has been sold.

289 Q. You have tried to sell it all but been unable to move it?

A. We have been taking it on as fast as we move it.

290 Q. Have you been collecting, during the past years, as much as you could from the notes, bills payable, to the bank?

A. Yes, sir.

291 Q. Found them pretty slow?

A. Yes, sir.

292 Q. A great many bills not been liquidated by this time?

A. Not a great many, no.

293 Q. A large number been placed in judgment?

A. It is our practice to place them in judgment before they outlaw.

294 Q. Now would this condition, paying off the depositors in full in the failed banks, have any appreciable effect on this bad paper, whereby those fellows would pay their debts?

[fol. 59]

Mr. Abbott: Object to that as cross examination.

The Court: Overruled.

Exception.

A. I think it would have some effect, because the general business conditions being better would naturally reflect into all lines of business, lines of assets.

295 Q. In the report, Exhibit 4, under the portion that comes from Secretary Bliss there are classes 1, 2, 3 and 4; do you know what classes those comprise? (Reads) "Classes No. 1, 2, 3, and 4 show no loss to the Guaranty Fund as the capital and surplus would take care of all losses." You don't know how many banks that would comprise?

A. It can be computed. There are 41 banks in Class 5 and 23 banks in Class 6, 820 banks in all.

296 Q. I don't quite understand, how would there be any loss to the Guaranty Fund in classes 1, 2, 3 and 4?

A. There would be no loss.

297 Q. It is a report of going banks?

A. Yes, but if they had any loss, say there was a loss, the capital would take care of that loss.

298 Q. In other words, classes 1, 2, 3 and 4 are apparently considered as being solvent banks and would continue solvent, in which there would be no loss; out of the 820 banks there would be 726 in classes 1, 2, 3 and 4 from which you would not expect any loss?

A. Yes.

[fol. 60] 299 Q. Whereas in Class 5 with 41 banks it would show a loss of approximately $1,750,000 and Class 6, with 23 banks shows a loss of $1,645,450?

A. The capital and surplus is to be subtracted from the amount of the losses. The loss in Class 5 would be $1,750,000 less the capital and surplus.

300 Q. In other words, there was capital and surplus of $1,500,000 and there was bad paper of $1,750,000; so you would only expect a loss to the Guaranty Fund of $25,000 and that interpretation is to be used as the net loss of the Guaranty Fund in Class 6 also?

A. Yes.

301 Q. And the statement below, then, at the very bottom (reading): "The 64 banks in Classes No. 5 and 6, after deducting capital and surplus, show a net loss of approximately $1,118,000 to be absorbed by the Guaranty Fund" and that amount, to be added to the $6,197,000 as making the total net loss to be absorbed by the Guaranty Fund was the information given to the bankers of the state as the ultimate loss to be sustained?

Mr. Abbott: Objected to as leading.

The Court: Overruled.

Exception.

A. Yes, sir.

302 Q. Was a copy of this report given to this committee of bankers, the original of this report, Mr. Peterson?

A. The original reports were filed with them and this report was made and distributed to the banks.

[fol. 61] 303 Q. That is, Exhibit #4 was distributed to the bankers from your office and from Mr. Bliss' office?

A. From my office.

304 Q. In the examination made by you or your department of these various banks turned over to you in how many did you find evidence of fraudulent conduct on the part of the officers of the bank?

Mr. Abbott: Object to that as not proper examination and immaterial.

The Court: Overruled

Exception.

A. That is true in the very large portion of these banks, I couldn't state definitely.

305 Q. You mean in the large percentage there was evidence of fraudulent action of the officers?

A. Yes, sir.

306 Q. Well, would that account for some of the losses?

A. Yes, it is quite a material item.

307 Q. You spoke about the so-called deflation period of 1921, and 1922. Were you speaking of the banks turned over in 1923 or were you speaking of the banks turned over in 1928?

A. I was speaking of all the banks turned over.

308 Q. In the banks that came into your office in 1928, would the loss run back to 1921 and 1922?

A. Most of them do.

309 Q. And that bad paper was permitted to be carried during all that time in those banks?

A. I would have to say yes. Perhaps the loss had not [fol. 62] become apparent but the loss originated back in 1921.

310 Q. Wouldn't the loss become apparent when the period of deflation was over?

A. It should, to quite an extent.

311 Q. In the banks turned over to your department for your examination, had a great many been insolvent for a long period before being turned over?

Mr. Abbott: Objected to as no foundation laid.

312 Q. As shown by the books and by your examination?

The Court: You may answer.

Exception.

A. Yes, quite a number of them?

313 Q. What proportion of them?

A. I wouldn't want to give any off hand answer as to that.

314 Q. As to length of time?
A. No, as to number.
315 Q. Would you say more than half?

Mr. Abbott: Objected to as not proper direct examination, leading and suggestive.
The Court: Overruled.

Exception.

A. I don't believe I would want to venture a guess on that.

Mr. Gaines: That is all.

Recross-examination.

By Mr. Abbott:

316 Q. Mr. Peterson, on the statement Exhibit 1 and the set up of assets is the Stockholder's Liability included in the set up of assets?
[fol. 63] A. No, it isn't. I would like to make a statement about that. They include in the heading the stockholder's liability which strictly speaking is not considered as an asset but it isn't included in those figures. In other words, everything of value belonging to those banks is shown in those figures.
317 Q. Now Mr. Gaines asked you if this particular assessment would cut any particular figure with respect to these assets. Would a determination that the—— (interrupted)

Mr. Gaines: Object to this as repetition.
The Court: Sustained.

Exception.

Mr. Abbott: That is all.

Recross-examination.

By Mr. Hotz, for intervenors:

318 Q. Mr. Peterson, just a question in connection with a summary that I think you published on December 31, 1928.

Mr. Gaines: Objected to as not cross-examination.

319 Q. The total liabilities since June 30, 1914 of the Guaranty Fund Commission was listed at $75,650,858.16 up to the 27th day of December, 1928, is that correct?

Mr. Gaines: Objected to as not cross-examination. There was no examination in reference to the item in evidence.

The Court: He may answer.

Exception.

A. I can't verify that. I can give you the total up to [fol. 64] December 31, 1928.

320 Q. All right.

A. $75,650,933.92.

321 Q. Of that total liability, how much has been paid from amounts realized from assets, aside from assessments paid in by the banks?

A. There has been about fifty millions of that paid, and approximately 70% of that amount was obtained from the assets and 30% from the Guaranty Fund.

322 Q. So that sixteen million have been paid into the fund from the banks?

A. It is a little more than sixteen million, sixteen million, five hundred thousand.

323 Q. And the total liabilities to depositors is approximately as given by you, twenty-five million?

A. $26,400,000.

324 Q. And the total of the resources of the Guaranty Fund Commission, according to book values as of December 31, 1928, is $39,531,605.93?

A. Yes.

Mr. Hotz: Just the summary. I wanted it all in one place in the record. That is all.

Witness excused.

Recess.

[fol. 65] EXHIBIT No. 1

Guarantee Fund Commission

Assets, Liabilities, and Expected Realization as of December 31, 1928

Total assets & stockholders' liability:

	Book value	Expect to realize
72 Going Concerns	$17,188,717.15	$7,549,031.26
132 New Receiverships	15,926,403.43	2,552,290.00
47 Old Receiverships	2,327,336.84	156,440.00
70 Sale Assets	4,089,148.51	193,571.39
	$39,531,605.93	$10,451,932.65

Total liabilities:

72 Going Concerns	$13,726,441.26
132 New Receiverships	12,650,871.43
47 Old Receiverships	13,970.37
70 Sale Assets	None
	$26,400,282.76

Summary:

Total liabilities	$26,400,282.76
Total Expected Realization	10,451,932.65
Deficit	$15,948,350.11

[fol. 66] EXHIBIT No. 2

Annual Report of the Guarantee Fund Commission of the State of Nebraska For the Fiscal Year Ending June 30th, 1927

Prepared by Van E. Peterson, Secretary

. . . . . .

[fol. 66a] Realization and Liquidation

Under the statement of Realization of Assets and Liquidation of Liabilities we have shown the amount of assets realized and liabilities paid during the fiscal year in each division of the work. We have also shown the percentage of liabilities in each division paid from assets. These payments were made with cash remaining from the collection of assets after all the expenses of operation had been paid as well as interest and taxes on real estate and other monies expended for the purpose of protecting assets. You will note that more than $7,500,000.00 of liabilities were paid

during the twelve months, and of this amount more than $5,000,000.00 was cash secured from assets, or a percentage of 67%. In our June 30, 1926 report we showed total liabilities against the Guaranty Fund of $13,252,273.26, so in twelve months an amount equal to more than one-half of the total shown has been paid. Thus during the fiscal year we have paid liabilities at the rate of approximately $25,000.00 per day. This will give some idea of the volume of work and while our liabilities are more now than a year ago, it must be remembered that 40 additional banks with liabilities of over $11,000,000.00 were closed by the state and turned to us for liquidation. It is our practice to ask that banks be closed and turned to us as soon as their condition is such that the stockholders can not restore solvency.

Under the General Summary we show the liquidation for the entire period since the Depositors' Guaranty Law has been in effect. During that time 191 banks have been closed and more than $37,000,000.00 has been paid to depositors without the loss of a single cent to any depositor. Of this amount 57% was secured from the collection on assets. This percentage includes the work of both the Commission and the Old Receivers who handled the first 58 banks which were closed. It is interesting to note the comparison of liquidation under the two systems. The Old Receivers in the paying of $14,600,000.00 of liabilities secured but 43.54% from assets, while the Commission in paying $22,400,000.00 of liabilities secured 66.12% from assets. Had the same ratio continued as under the Old Receivers, it would have been necessary for the Commission to have drawn on the [fol. 66b] Guaranty Fund for more than $5,000,000.00 in addition to what was drawn, so the increased percentage of realization on assets by the Commission amounts to a practical saving of $5,000,000.00 to the state bankers of Nebraska in the three and one-half years. In addition, it would have probably been impossible for the bankers to have met these increased assessments.

Operating Cost

Under the statement of Operating Cost we show the amount of costs in each of the four divisions. We have also divided this as to the cost per dollar of total realization

and feel that the average cost of 4.7 cents per dollar on a realization of more than $8,500,000.00 of assets needs no apology, for in considering these costs it must be remembered that part of the cost of realization in Going Banks would include such items as extra clerk hire, taxes, supplies, heat, light, etc. It is hard to estimate just what portion of the cost should be charged to the expense of operating the bank but feel sure that it is at least 50% of the total cost. The additional collection which we are able to make from assets because of the going bank, however, more than offsets this extra cost. Sometimes we hear complaints made by people who are not in possession of facts, that the expense of operating a bank under the Commission is far greater than in other banks. About a year ago, the Department of Trade and Commerce prepared an analysis of expense covering all of the solvent state banks in Nebraska for the year previous. Using the same items of expense which they did in computing their average per cent of expense on deposits, we find the percentage in the 73 banks operated by the Commission during the past fiscal year was 2% as compared to the average for the 845 solvent banks of 2.73%. These figures should refute erroneous statements sometimes made by uninformed persons as to the cost of operating going banks under the Commission.

It is also interesting to note the operating cost of realization under the system of individual receivers employed prior to the organization of the Commission and that of the Commission since its organization. The Old Receivers did not, of course, operate going banks, so comparing only like work, we find that the cost per dollar on total realization under Old Receivers was 6.7 cents per dollar while [fol. 66c] under the Commission it has been 3.4 cents per dollar, or a reduction of practically one-half. This reduction in expense amounts to a saving of $825,000.00 in overhead costs since the Commission has had charge of liquidation. The saving of $825,000.00 in operating costs and the increased percentage of realization from assets of more than $5,000,000.00 or a total of approximately $6,000,000.00 in three years and a half seems to justify the bankers in their statement to the Legislature of 1923 that a commission composed of bankers selected by the bankers them-

selves could handle the liquidation of failed banks on a more business-like basis than the system then in effect.

Legislation

So many times have I urged the bankers of Nebraska to associate themselves together more strongly for the purpose of securing needed legislation that I hesitate to mention it again. However, it does seem to me that they should do so, not for the purpose of lessening any protection to the depositors, but rather in strengthening it. Many changes are needed in our present laws which would enable the Commission to carry on their work in a far better manner. We are handicapped in many ways because of laws under which we are forced to operate. Inasmuch as the state bankers of Nebraska are required, and do pay the losses in failed banks, it still seems to me that the supervision of solvent banks should be placed upon a different basis. The system now employed is entirely wrong. If it were possible, and I believe it is, the administration of banking laws should be removed from political control. By the payment of larger salaries in the Department of Trade and Commerce, men could be secured who would devote their entire time and energy to that work and not feel that their position was only temporary. I still maintain that some day it is going to be necessary for these changes to be made. The bankers have a right to demand it and after what they have done for the good of the state as a whole in maintaining the Guaranty Fund through these years of deflation, it does seem that the state can not refuse their request.

A year ago in closing my report to you covering the work up to June 30, 1926, I said: "Truly, Nebraska is a remarkable state and tells a story no other state can tell." At the [fol. 66d] close of this fiscal year, we can both truthfully and proudly re-affirm that statement. The past year with its payment of more than $7,500,000.00 in cash to claimants adds another chapter to the story. Nebraska is proud of her record made by the Depositors' Guaranty Law, and with the favorable crop conditions which nature has bestowed upon us, the future appears much brighter. We know the larger portion of our troubles is past. Whatever

degree of success has been obtained by the Commission is due to the loyalty and cooperation of the state bankers, the members of the Commission, and all those who are employed in the work, and to all I want to express my appreciation of their services and loyalty.

Respectfully submitted.

Van E. Peterson, Secretary.

Lincoln, Nebraska, August 11, 1927.

[fol. 67] EXHIBIT No. 4

The following is a part of the report submitted by Secretary Peterson of the Guarantee Fund Commission to the Committee of bankers appointed by Governor McMullen to investigate the condition of the Guaranty Fund. The statement shows the nominal or face value of each class of assets and the cash value which we placed on each as of May 17, 1927. The liabilities shown are all the liabilities of every kind against the Guaranty Fund in the banks under the management of the Guarantee Fund Commission as of that date.

	Nominal value	Expected to realize
Cash	$922,074.21	$888,922.77
Bills Receivable	16,570,167.88	5,722,522.22
Real Estate	4,378,517.80	2,149,135.63
Other Assets	2,802,790.36	512,745.33
Stockholders' Liability	4,046,667.86	1,005,596.90
Total	$28,720,257.11	$10,278,922.85
Liabilities to be paid:		
In going banks		$14,652,089.52
In receiverships:		
Preferred Claims	$620,467.29	
Deposits not classified	162,504.75	
Receivers' Certificates	1,238,619.92	
		2,021,591.96
Total		$16,673,681.48

Summary

Liabilities to be paid		$16,673,681.48
Expected to realize on Assets	$10,278,922.85	
Cash in Depositors' Guaranty Fund	197,368.32	
		10,476,291.17
Net Loss		$6,197,390.31

As of the same date Secretary Bliss of the Department of Trade and Commerce submitted a report covering the 820 banks under his supervision. He divided these into six classes, as follows:

Classes No. 1, 2, 3 and 4 show no loss to the Guaranty Fund as the capital and surplus would take care of all losses.

Class No. 5, with 41 banks with capital and surplus of approximately $1,500,000, shows a loss of $1,750,000.

Class No. 6, with 23 banks with capital and surplus of approximately $763,000 shows a loss of $1,645,450.

The 64 banks in Classes No. 5 and 6, after deducting capital and surplus, show a net loss of approximately $1,118,000 to be absorbed by the Guaranty Fund.

Received in Evidence.

[fol. 68] EXHIBIT No. 5

Fifteen Years of Guaranty Fund

Secretary's Report to Guarantee Fund Commission, State of Nebraska

. . . . . .

[fol. 68a] A condensed summary of the audit follows, to which I have added a brief explanation of the different items.

Depositors' Guaranty Law became effective January 3, 1911.

Total banks closed January 3, 1911, to June 30, 1926, 151.

On June 30, 1926:

Banks being operated as going concerns	36
Banks in receivership	102
Banks fully liquidated	13
Total	151

[fol. 68b] Summary of Assets

To be realized:		
Shown at date of suspension		$46,517,537.86
Additional coming into hands of receiver		910,660.69
Total		$47,428,198.55
Realized:		
By Old Receivers	$8,571,450.34	
By Commission	18,770,125.87	
		$27,341,576.21
Not Realized—June 30, 1926:		
In Going Concerns	$11,124,943.22	
In Receiverships	8,961,679.12	
		$20,086,622.34
Total		$47,428,198.55

Summary of Liabilities

To be Liquidated:		
Shown at date of suspension		$42,134,123.35
Additional liabilities proved		1,377,328.94
Total		$43,511,452.29
Liquidated:		
By Old Receivers	$14,610,896.35	
By Commission	16,325,453.58	
		$30,936,349.93
Not Liquidated—June 30, 1926:		
In Going Concerns	$10,917,730.50	
In Receiverships	1,657,301.86	
		$12,575,032.36
Total		$43,511,452.29

Analysis of Liquidation

Total Liquidation:	
From Realization on Assets	53.19%
From Depositors' Guaranty Fund	39.56%
From Receivers' Certificates	7.25%
	100.00%
Comparison of Liquidation:	
From Realization on Assets:	
Old Receivers	41.54%
Commission	58.24%
From Depositors' Guaranty Fund:	
Old Receivers	18.35%
Commission	28.03%
From Receivers' Certificates:	
Old Receivers	8.11%
Commission	13.73%

[fol. 68c] Operating Costs in Receiverships

Old Receiverships:	
Cost per dollar on total realization by Old Receivers....	6.7 cents
Cost per dollar on total realization by Commission.....	2.7 cents
Cost per dollar on cash realization by Old Receivers....	11.6 cents
Cost per dollar on cash realization by Commission.....	15.0 cents
Commission Receiverships:	
Cost per dollar on total realization.....	2.1 cents
Cost per dollar on cash realization.....	4.01 cents

Balances Due Depositors' Guaranty Fund

From 58 Old Receiverships.....	$7,706,211.89
From 57 New Receiverships.....	4,531,195.76
	$12,237,407.65

Total Resources as of June 30, 1926

Cash on hand.....	$2,214,176.50
Bills Receivable.....	14,808,312.96
Real Estate.....	3,619,761.51
Judgments	1,345,299.98
Other Assets.....	1,032,373.50
Total	$23,109,924.45

Total Liabilities as of June 30, 1926

Going Concerns:		
Deposits		$10,615,795.82
Receiverships:		
Preferred Claims.....	$332,962.42	
Deposits not Classified.....	346,959.16	
Receivers' Bills Payable.....	1,000.00	
Trust Funds.....	13,594.86	
Receivers' Certificates.....	2,241,961.00	
		2,936,477.44
Total		$13,252,273.26

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[fol. 68d] Valuation of Assets as of June 30, 1926

Cash on hand	$2,214,176.50
Assets in Going Concerns (65% of face value)	6,569,773.40
Assets in Receiverships:	
Old (10% of face value).....	330,797.86
New (25% of face value).....	1,321,423.75
Sale Assets (Bought at public sale).....	100,102.63
Total estimated value.....	$10,536,274.14
Total Liabilities of Guaranty Fund	$13,252,273.26
Total Value of Assets.....	10,536,274.14
Leaving a difference of	$2,715,999.12

[fol. 68e] While this report covers the work up to July 1, 1926, the condition as of January 1, 1927, is but very little

different. During the last six months of 1926 we took over eighteen banks but the loss in these banks is not as much as the loss paid during the same period. On January 1st we were operating forty-four banks as against thirty-six on June 30th, but the deposits of these forty-four were one hundred thousand dollars less. The average loss per bank closed is continually growing less and we do not feel that there will be a very large number of banks yet to be closed in which there will be a loss to the Guaranty Fund.

Respectfully submitted.

Van E. Peterson, Secretary.

Lincoln, Nebraska, January 22, 1927.

[fol. 69] Mr. Clarence G. Bliss, called as a witness on behalf of the plaintiffs, after being duly and solemnly sworn, testified as follows:

By Mr. Flansburg:

325 Q. State your name?

A. Clarence G. Bliss.

326 Q. Your residence?

A. Lincoln.

327 Q. What is your occupation, Mr. Bliss?

A. I am secretary of the Department of Trade & Commerce.

328 Q. How long have you been secretary of that Department?

A. A little over two years.

329 Q. As secretary of the Department, what records and files do you have in your custody and possession?

A. The files in connection with the Bureau of Banking and several other bureaus.

330 Q. Since you have been secretary you have acquainted yourself with the conditions of the state banks, through what matters?

A. By the reports filed by the banks and by the examination reports as filed by the examiners.

331 Q. Do you keep all the information you receive on file in your department?

A. Yes, sir.

332 Q. Do you have that on file there now?

A. Yes.

333 Q. Do you know Mr. Mooney, the accountant, Mr. Bliss?

A. I know him.

334 Q. Did you refer to him some records upon which to [fol. 70] gather data?

A. Yes, sir.

335 Q. What were the records you furnished him, part of your office records?

A. Yes, sir.

336 Q. Was that under any particular arrangement?

A. Yes, sir.

337 Q. What arrangement was that?

A. That he should have access to the reports of the banks in this case, that he should come into the office and work under my supervision; that he wanted to get data from the banks, that was reported by the banks, and I told him he could have the files.

338 Q. You furnished him these records from which to get and catalog this date?

A. Yes, sir.

339 Q. You have those records in your office?

A. Yes, sir.

340 Q. And you are able and ready to produce these records which he used for inspection in this court, Mr. Bliss?

A. Yes, sir; So far as I know, I didn't see him copy that stuff, he was there several days.

Mr. Flansburg: That is all at this time but I wish the privilege of recalling you at another time.

By Mr. Abbott:

341 Q. I want to ask you one question, whether Mr. [fol. 71] Mooney operated under your supervision and direction. To what extent was he under your supervision and direction?

A. That is an error, he was not under my supervision. The records were all turned over to him.

342 Q. You gave him what he asked for?

A. Yes.

343 Q. You didn't assist him any further than to give him what he asked for?

A. Yes, that's all.

344 Q. The attorney general asked you to let him work there under your supervision?

A. Yes.

345 Q. When you used the word supervise, that is what you meant?

A. Yes.

Mr. Abbott: That is all.

Witness excused.

Mr. Hugh Mooney, called as a witness on behalf of the plaintiffs, after being duly sworn, testified as follows:

By Mr. Flansburg:

346 Q. State your name, please?

A. Mr. Hugh Mooney.

347 Q. Your residence?

A. Lincoln.

348 Q. How long have you lived in Lincoln?

[fol. 72] A. Fifteen years.

349 Q. What is your present occupation?

A. Accountant.

350 Q. Public Accountant?

A. Yes, sir.

351 Q. With what firm are you?

A. Walker and Fulk.

352 Q. Certified Public Accountants in this city?

A. Yes, sir.

353 Q. How long have you been with that firm?

A. About four years.

354 Q. Approximately four years?

A. Yes, sir.

355 Q. What was your business prior to that time?

A. I was engaged in private accounting work.

356 Q. For the First Trust Company for a while?

A. No, for the First National Bank.

357 Q. Did you get certain data and tabulate it from the records of the Department of Trade and Commerce of the State of Nebraska?

A. Yes.

358 Q. And when did you get this data?

A. It was last week, I began las- Tuesday, I believe.

359 Q. Were these records from which you gathered the data records furnished by Mr. Bliss of the Department of Trade and Commerce?

A. Yes.

360 Q. And what information did the records contain?

[fol. 73] Mr. Abbott: Object to the form of the question, have no objection to his testifying to what the records contained, what general information was contained in these records.

361 Q. The general information covered by the records?

A. There were statements of expenses, earnings and dividends of the state banks of Nebraska.

362 Q. Of each of the state banks of Nebraska?

A. Yes.

363 Q. Covering what time?

A. Covering various times. One set of records covered the time from January 1, 1927 to June 30, 1927; other reports for the period July 1, 1927 to December 31, 1927 and the third period covered was from January 1, 1928 to June 30, 1928.

364 Q. Mr. Mooney, handing you Exhibit 6 I will ask you if that is a showing of the data you procured, copied from the records you have described covering the period from January 1, 1928 to June 30, 1928?

Mr. Abbott: Objected to as no sufficient foundation laid as witness has not testified to the records, let him identify the records.

365 Q. Now, Mr. Mooney, you may describe the character of the records you examined.

A. The records were reports prepared and sent in by the state banks of Nebraska to the Department of Trade and Commerce.

[fol. 74] 366 Q. The reports were reports of earnings and dividends and expenses and losses and those are also covered by your report?

A. Yes sir.

367 Q. Were those sworn reports?

A. They were acknowledged before a Notary Public.

368 Q. They are on file at the Department of Trade and Commerce and were furnished you by Mr. Bliss?

A. Yes.

369 Q. Now, I will repeat the question: please state if the Exhibit 6 is the showing made up of the copies of the data as shown upon the reports from January 1, 1928 to June 30, 1928?

Mr. Abbott: Objected to as no proper foundation and immaterial.

The Court: Overruled, you may answer.

Exception.

A. It is.

370 Q. Now you may describe just what data you took from these reports and what you have embodied in this showing.

A. I took from the reports on file there the net profits for that period, the Guaranty Fund Assessments paid during that period, assessments made on the stockholders, the capital stock June 30, 1928, surplus June 30, 1928, undivided profits June 30, 1928 and the Guaranty Fund assessment of December 15, 1928. The last however, was taken from another record.

371 Q. Did you take this from all the banks, or just a portion of them?

[fol. 75] A. Just a portion of them.

372 Q. Which banks did you copy in your showing?

A. Those banks whose net profits, according to the reports, were less than 6% on the capital stock.

373 Q. In the column headed "Net Earnings" there are a great many figures appear in red ink. What do those figures indicate?

A. They indicate a net loss.

374 Q. Under the column "Net Earnings" when a figure appears in red ink it means the bank sustained a net loss?

A. Yes, sir.

375 Q. And when the figure appears in dark ink it means the bank had net earnings of that amount?

A. Yes, sir.

376 Q. Now do these reports show how these net earnings are arrived at, the reports from which you took this data?

A. Yes, sir.

377 Q. And what figures enter into that?

A. First is shown the gross income or revenue; then is shown expenses of various kinds, salaries, taxes and interest; and then is shown what is called loss; that includes losses on bad notes and sometimes depreciation and other losses.

378 Q. The column that you have headed "Net Earnings" as shown on your report has no relation to, as to whether dividends were paid?

A. No.

[fol. 76] 379 Q. And dividends are not figured as being expense of operation?

A. No.

380 Q. How many banks are covered by Exhibit #6?

A. 353.

381 Q. 353 whose earnings were less than 6%?

A. Yes.

382 Q. What can you say as to the total net earnings of that class of banks?

Mr. Abbott: Objected to as incompetent and immaterial.

383 Q. On the first page of the Exhibit you have totaled the column of net earnings, guarantee fund assessments and the other columns.

A. Yes, sir.

384 Q. And these entries you have made are all accurate?

A. Yes, sir.

385 Q. And the totals are accurate?

A. Yes, sir.

386 Q. And the summarries are accurate summaries?

A. Yes, sir.

Mr. Flansburg: We offer in evidence Exhibit 6.

Mr. Abbott: We object to the introduction in evidence of Exhibit 6 as irrelevant and incompetent and that there is no sufficient foundation laid and for the further reason that the direct testimony in this case, of

[fol. 77] the issues presented by the plaintiff's if there is an issue, is the condition of all of the banks of the state and the general situation as to the condition of the banks in the state and their ability to pay; and as a matter of public concern that the court should not permit a bunch of banks like this to be segregated from the total and their alleged condition set up in this manner. And as a part of this objection we state that from these same records made available to the witness and from other records we have already prepared in the department a statement showing the condition of all the banks in the state without segregating specific banks and in behalf especially of Mr. Bliss, head of the Department of Trade and Commerce, we strenuously object to the introduction of this exhibit, or any of the similar exhibits, in evidence here. And in this connection I challenge your Honor's attention to the fact that the condition of the particular banks can, under no circumstances become the testimony in this case, even under the theory advanced by the plaintiffs here and we insist that counsel produce a statement showing the condition of all the banks for the reason that it does these [fol. 78] banks especially an unjustifiable wrong, and it exposes here, segregated, the information with respect to particular banks which should not be introduced in evidence in this way.

In that connection I want to state that so far as the fact go we have nothing whatever to conceal and for two weeks past we have had under preparation by a force of employees a set up as to the condition of all the banks of the state. It is available to counsel if they want it and while I concede their right to introduce evidence in their own way, I do not think the condition of the 353 banks is not clear therein.

Mr. Flansburg: We renew our offer.

The Court: Objection overruled.

Exception.

Exhibit No. 6 received in evidence, is attached to and made a part of this Bill of Exceptions, appearing at page 93 hereof.

By Mr. Flansburg:

387 Q. Mr. Mooney, I will ask you if the column over to the right side, "Guarantee Fund Assessment December 15, 1928," has entered into the preceding figures on this showing?

A. No, it has not.

388 Q. And this has nothing to do with the assessment of August, 1928?

A. No.

389 Q. Except y/u set out as a matter of information the amount of the assessment, just the assessment we are now contesting?

A. Yes.

[fol. 79] By Mr. Campbell: Is that offered by the Abie State Bank alone or by the 559 state banks that are apparently plaintiffs here?

Mr. Flansburg: Offer is for the Abie Bank and all the other banks.

Mr. Gaines: In this action by the 559 state banks or by the Abie State Bank?

Mr. Campbell: Let the record show the list of banks contained in Exhibit 6 contains the names of many banks not listed in plaintiffs' Exhibit "A" attached to plaintiffs' petition.

By Mr. Flansburg:

390 Q. I will ask you as to these 353 banks, did you prepare also any showing of earnings for the first six months of 1928?

Mr. Abbott: Objected to as immaterial.

The Court: He may answer.

Exception.

A. It shows no earnings in the aggregate.

391 Q. What does it show with respect to earnings?

A. It shows a net loss of $356,076.18.

392 Q. What was the aggregate assessments levied and paid by these banks during that period?

A. $301,006.98.

393 Q. What was the amount of the assessments on stockholders of theses banks during that period?

Mr. Abbott: Object to the question as leading.

The Court: You may answer.

Exception.

[fol. 80] A. $155,921.66.

394 Q. Handing you exhibit 7 I will ask you if that is another Exhibit and showing which you have prepared from the records you described in the Department of Trade and Commerce?

A. It is.

395 Q. For what period of time did those records pertain to?

A. January 1, 1927, to June 30, 1927.

396 Q. And was this record made up in the same manner as the other?

A. Yes.

397 Q. And how many banks are covered by this Exhibit?

A. 413.

398 Q. Under the column of net earnings the red figures indicate loss?

A. Yes, sir.

399 Q. And the dark figures, profits?

A. Yes, sir.

Mr. Flansburg: We offer in evidence Exhibit 7.

Mr. Abbott: We make the same objection and further specifically object to the compilations of the conclusions of the witness as contained on the bottom of the page.

400 Q. Are the conclusions contained on the bottom of the first page accurately figured?

A. Yes, sir.

401 Q. And is all the data accurately taken from the records you examined?

A. Yes, sir.

[fol. 81] 402 Q. They are correct copies of those records and the information on those records?

A. Yes, sir.

Mr. Flansburg: We offer in evidence Exhibit 7.

Mr. Campbell: Intervenors object as immaterial and incompetent.

Mr. Abbott: We offer the same objection.

By Mr. Abbott:

403 Q. Referring to the item "Percentage of net loss to Capital Stock", that is your computation, is it?

A. Yes, sir.

404 Q. And that computation is based on the percentage of capital stock rather than the proportion of that net loss against undivided profits?

A. Yes, sir.

405 Q. And you could with the same token,—As a matter of fact, if there was a loss of 2.04% for the period it would come off the net profits rather than off the capital stock, wouldn't it?

A. I don't understand your question.

406 Q. That is, just the percentage or ratio that one figure bears to another?

The Court: I assume these are conclusions drawn by the expert from these figures?

Mr. Flansburg: Yes.

The Court: Objection overruled.

Exception.

Exhibit 7 received in evidence, attached to and made part of this Bill of Exceptions appearing on page 94 hereof.

Mr. Flansburg:

407 Q. Handing you Exhibit No. 8, Mr. Mooney, I will [fol. 82] ask if that is another showing covering the period from July 1, 1927, to December 31, 1927?

A. It is.

408 Q. And it is a correct and accurate abstract of the date that you got from these records?

A. Yes, sir.

409 Q. And the tabulations you made there are all correct?

A. Yes, sir.

410 Q. And the information on the front page are all properly worked out mathematically?

A. Yes sir.

411 Q. How many banks are covered by the showing?

A. 376.

Mr. Flansburg: We offer in evidence Exhibit 8.

Mr. Abbott: We made the same objection as to Exhibit 6.

The Court: Overruled.

Exception.

Exhibit 8 received in evidence, is attached to, and made a part of this bill of exceptions, appearing at page 95 hereof.

412 Q. Now, Mr. Mooney, from July 1, 1928 to December 31, 1928, there were no complete records covering this same information?

A. No, sir, I was informed by the employees in the Department that very few reports had been received.

413 Q. So this report is as complete as you were able to get it from the records in the Department of Trade and Commerce?

A. Yes sir.

Mr. Flansburg: That is all.

[fol. 83] Cross-examination.

By Mr. Abbott:

414 Q. Mr. Mooney, did you do all this work yourself?

A. No.

415 Q. Who else participated in the doing of this work?

A. You want his name? Mr. Swift of our office.

416 Q. Anyone else?

A. No.

417 Q. Have you ever had any experience with bank accounting?

A. I was employed in the First National Bank seven years.

418 Q. The First National, Lincoln?

A. Yes, sir.

419 Q. And how about Mr. Swift?

A. I couldn't say as to his banking experience.

429 Q. Now, what percentage of these reports did he prepare?

A. Well, I can tell by looking at them better. (Exhibits handed to witness.) Now the first report was prepared entirely by me.

421 Q. That is, Exhibit 6 was prepared entirely by you?

A. Yes, sir.

422 Q. And Exhibit 8?

A. Exhibit 8 was prepared entirely by Mr. Swift but the summary was prepared by me. Then Exhibit No. 7 was, well I would say approximately half of it was prepared by me and half by Mr. Swift and then the summary by me.

423 Q. And in arriving at your figures, in preparing [fol. 84] these statements did you have occasionally to make some substractions and arrive at some of your results by computations in that manner?

A. In the first Exhibit the first two pages were arrived at in that manner.

424 Q. And were there some instances where the information you sought was not wholly clear and you exercised your judgment as to how it might be figured?

A. Yes.

425 Q. A considerable number of them?

A. I wouldn't say a considerable number.

426 Q. You have had experience with that particular type of report before?

A. No.

427 Q. Never seen that type of report before?

A. No.

428 Q. Did you have more than one type of report from which you made up your figures?

A. No.

429 Q. Did you make any requests which in doubt for any other reports?

A. Where a report was not quite clear I would consult with employees of the office and they would explain.

430 Q. And you followed the information they gave you?

A. I would always use what they told me. Certain cases they couldn't explain.

431 Q. And you would use your own judgment?

A. Yes.

[fol. 85] 432 Q. You didn't make any inquiries for access to any other reports for these semi annual periods for the

purpose of explaining the particular reports you were making?

A. I understood there were no other reports there.

433 Q. You knew from your banking experience the mathematical end?

A. Yes, sir.

434 Q. Now, you did not ask for any semi-annual reports to check up from, did you?

A. They were semi-annual reports that I used.

435 Q. These reports you were examining were kind of general statements, were they not? The general financial reports published by the banks?

A. No, this particular report was not published, as I understood.

436 Q. Now, in those cases where you used your own judgment as to the figures you haven't now, are not now able to state whether you arrived at the correct result so far as the condition of the bank was concerned? You used your own judgment?

A. I just showed what the report showed.

437 Q. I mean those instances where you couldn't yourself make out clearly just what was meant by the report.

A. Yes.

438 Q. And in those cases you would not now be certain whether you got the accurate result, would you?

A. No, not in those particular cases.

[fol. 86] 439 Q. You had made available to you all the reports of all the banks for these respective periods?

A. Yes, sir.

440 Q. And you made no attempt to classify all of them?

A. No.

441 Q. You understood you were to pick out those that would make the best showing and disregard the others?

A. We were to pick out those that showed less than six per cent.

442 Q. Less than six per cent?

A. Yes, sir.

443 Q. In order to do that you had to examine all the reports and see if they made six per cent for the period?

A. Yes, sir.

444 Q. Now, you have incorporated into your statement here a statement of the Guaranty Fund Assessment for December 26, 1928, haven't you?

A. December 15th was the date.

445 Q. December 15, 1928?

A. Yes, sir?

446 Q. Now your report is of June 30, 1928, isn't it?

A. Yes, sir.

447 Q. As a matter of fact, in April 1928, in the period you incorporated, in each of those periods, there was an assessment levied and paid, a special assessment independent of this December assessment you set up?

A. Yes, sir.

448 Q. And as a matter of fact you know as a banker [fol. 87] that the December assessment was in the last six months and to be paid out of their results?

A. Yes, sir, it has no bearing upon it, just a matter of information.

449 Q. Now, for that six months period you find the deficit in net earnings is $306,076.18?

A. Yes, sir.

450 Q. Now, then, the banks as of June 30, 1928, had undivided profits of $331,780. Was that after deducting operating loss for that period?

A. Yes, sir.

451 Q. Then prior to deducting operating loss for the period they had approximately $636,000 of undivided profits? And the operating expense came off of undivided profits?

A. Yes, sir.

452 Q. Then why set it up as "Percentage of Net Loss"? You combine it with capital stock when as a matter of fact the loss comes out of undivided profits?

A. It is merely the percentage of net loss to capital stock. It simply means the net loss of 353 banks as compared to the capital stock.

453 Q. It looks good to put it that way, is that it? Now did you use the same method on these other exhibits?

A. Yes, sir.

454 Q. Take Exhibit No. 7: where on that Exhibit do you show the undivided profits of the banks?

A. I don't show it.

455 Q. Where on Exhibit No. 8 do you show the undivided [fol. 88] profits of the banks?

A. It isn't shown.

456 Q. Then those Exhibits don't disclose whether the loss the banks sustained during that period came out of undivided profits, do they?

A. No, they don't show.

457 Q. And when you set up "Percentage of Net Loss to Capital Stock" you disregarded the undivided profits of the bank, did you not?

A. Yes.

458 Q. And you disregarded the fact, if it be a fact, that the net losses for the particular period might have come out of the undivided profits?

A. I didn't attempt to show that.

459 Q. Now, then, in making your compilations did you note the losses that the banks have charged off during the particular periods?

A. Did I note them, you say? I showed the net loss after the charge off had been made.

460 Q. You showed the net profit or net loss after the deduction of their operating expenses and the Guaranty Fund assessment and any other things they might charge off. Now did you examine what is termed "charge offs", items that are loss, losses on bad paper, you understand what they are, do you not? Did you examine them?

A. I did not examine them particularly. I took the figures shown on the reports after they had been charged off.

461 Q. Did you make any memorandum of those charged [fol. 89] off items and the effect that they might have had on the deficit that you arrived at?

A. No. One correction on that first Exhibit: the first two pages show charged off items and then after that we were pressed for time and we didn't show it thereafter.

462 Q. Do you know whether or not you included in this statement any reports of banks that had failed?

A. I included only the reports I found on file for that period.

463 Q. And you wouldn't know whether you got reports of some bank that had failed or not, would you?

A. No, I would not.

464 Q. Now, take the case of the Farmers and Merchants Bank of Havelock, which you set up as having a deficit of $44,000 and which is a substantial percentage of the net losses that you found. Did you not know that was a failed bank?

Mr. Flansburg: Objected to as repetition.
The Court: Sustained.

Exception.

Mr. Abbott: That is all.

Redirect examination.

By Mr. Flansburg:

465 Q. As to the column in each of these Exhibits, 6, 7, and 8 covering items of net earnings, was it necessary to make any,—you simply copied the figures you found in these reports?
[fol. 90] A. Yes, sir.
466 Q. And as to the Exhibit No. 6, the first two or three pages in which you cover gross earnings, expenses, net earnings, it was necesary for you to make a calculation in some instances in order to get the amount of the losses?
A. Yes, sir.
467 Q. In order to get the amount of loss?
A. Also to get the amount of expense.
468 Q. But not in any of these Exhibits was it necessary for you to, to get the item in the column headed "Net Earnings"?
A. As to the first two pages?
469 Q. As to the first two pages was it necessary to get items under the column, "Net Earnings"?
A. These other columns proved it.
470 Q. Were any items in Exhibit No. 6 under any columns headed "Net Earnings" items which you arrived at through calculations of your own?
A. Yes, sir.
471 Q. The only place you made any calculations of your own was in order to determine the amounts to put under columns, "Expenses" and "Losses"?
A. No, sir.

By Mr. Hotz:

472 Q. From the reports you have made up, Exhibits 6, 7, and 8, what have you left off, what did one show that

was not shown on the reports furnished you to make your compilation?

A. These reports show the net losses as copied from those reports. Then there is copied in addition the capital stock [fol. 91] and surplus.

473 Q. What did you leave out?

A. Nothing. The figures show gross earnings from all sources, interest, and taxes.

474 Q. And things charged off?

A. Yes.

475 Q. Depreciation on fixtures?

A. Yes.

476 Q. Building and Equipment?

A. Yes, I suppose so.

477 Q. There is nothing you think of that was left off?

A. No, I think not.

By Mr. Flansburg:

478 Q. Now, you mean you simply did not copy these on these reports? But these reports had taken into account all the expenses of the character you have been questioned about?

A. Yes, sir.

479 Q. And these show the correct losses after the deductions are made?

A. Yes.

By Mr. Campbell:

480 Q. Your report doesn't show the amount of salaries taken out by officers of the banks, does it?

A. No.

481 Q. And what those amounts would be we have no way of knowing? Do we?

A. No.

482 Q. And the item charged off as depreciation don't show?

[fols. 92-98] A. No.

483 Q. And we have no way of knowing the basis on which that is figured?

A. No.

484 Q. And it doesn't show here, does it?

A. No.

485 Q. And as to expenses you don't show any more than the total?

A. I don't show that.

486 Q. And what those expenses were and whether they were reasonable you have nothing in your report to show?

A. No.

By Mr. Abbott:

487 Q. As to the Abie Bank, does any one of these three reports show that the Abie Bank had declared dividends?

A. I don't remember.

488 Q. And if that report shows the Abie Bank declared a dividend, then you didn't see it?

A. I may have seen it.

489 Q. You included the Abie Bank in this statement?

A. Yes, sir.

It now being 4:30 o'clock P. M. the Court took an adjournment to ten o'clock A. M. the following day, January 30, 1929.

[fol. 99] The Court: Overrule motion to strike.

Exception.

Mr. Clarence G. Bliss, called as a witness on behalf of the plaintiffs, having been previously sworn, testified further as follows:

By Mr. Flansburg:

490 Q. Mr. Bliss, you say you have been Secretary of the Department of Trade and Commerce for two years last past?

A. Yes, sir.

491 Q. As Secretary of the Department of Trade and Commerce what are your duties with reference to getting information regarding the condition of existing state banks?

A. My duties are supervisory, supervising the state banks and studying the information that is sent into me by the examiners.

492 Q. Have you spent all your time getting acquainted with the state banks, and in supervising your examiners?

A. Together with the other Bureaus.

493 Q. How many examiners in your Department?

A. Thirteen.

494 Q. How many banks in this state, to day?

A. 726 banks reporting at this time.

495 Q. How often do the banks report their financial condition to your Department?

A. I should say 726 banks reporting December 31st. The [fol. 100] statute provides four reports yearly.

496 Q. Do each of the state banks make to you those four quarterly reports?

A. Yes.

497 Q. What is contained in those reports?

A. The resources and liabilities of the banks as published in public statements.

498 Q. Do you have all those reports on file in your office?

A. Yes, sir.

499 Q. Do you also get other reports from the state banks?

A. Yes, sir.

500 Q. And how do you get those reports?

A. The statute provides for directors' reports twice a year and such other reports as the Department may ask for in supervising the banks.

501 Q. When you ask for other information than is given in these quarterly reports do you send the bank a form prepared in your office and by you in which they are asked to answer questions?

A. I am not certain, probably we do.

502 Q. And do those reports come back to you filled in and sworn to by the officers of the bank?

A. Yes, sir.

503 Q. What is done with those reports?

A. They are placed in the files.

504 Q. How many of that character have you had in the two years you have been in office there?

A. We have asked for a special report which we have [fol. 101] made—written—at the Department, relative to the banks' earning conditions and expenses and dividends.

505 Q. How often are those reports given you by these banks?

A. Every six months.

506 Q. Handing you Exhibit No. 9 I will ask you if that is a form prepared in your office and sent to state banks for what is shown by their books?

A. Yes, sir.

507 Q. Now those reports are rendered each six months?

A. Yes, sir.

508 Q. And those are on file in your office?

A. Yes, sir.

509 Q. They are filled in and sworn to by the officers giving the information called for?

A. Yes.

510 Q. Are those the reports give- to Mr. Mooney and Mr. Swift from which they took their data?

A. Yes, sir.

511 Q. Now what other institutions, what private instutions do you have under your supervision? You have the trust companies and building and loan companies, too?

A. Yes, sir.

512 Q. And you have reports from them?

A. Yes, sir.

513 Q. And the methods used, are the reports similar to the reports from the banks?

A. Similar, but not made so often.

514 Q. And you also have the savings banks under your Supervision?

[fol. 102] A. Yes, sir.

515 Q. Now these thirteen examiners go to these banks and examine them—how frequently?

Mr. Abbott: Objected to as immaterial.

The Court: Overruled.

Exception.

516 Q. Every six months?

A. Hardly that often they haven't. We have had more than we could do.

517 Q. They make examinations of the state banks and report to you what the books show?

A. Yes, sir.

518 Q. And those reports are all kept on file?

A. Yes, sir.

519 Q. As to all the existing state banks in Nebraska?

A. Yes, sir.

520 Q. And you have familarized yourself with those reports, Mr. Bliss?

A. So far as I can.

521 Q. As these reports come in you examine them to see what the report is?

A. They come direct to my desk.

522 Q. And you examine them to see what the report is?

Mr. Abbott: Objected to as leading. I suggest that counsel make his questions clear as to what he wants so Mr. Bliss can answer.

523 Q. These reports come to your desk, Mr. Bliss?

A. Not altogether. I see a major part of those reports but it is almost impossible for one man to see all those [fol. 103] reports. I see them in a general way.

524 Q. You familiarize yourself with them constantly, that is one of your duties?

A. Yes, sir.

525 Q. Mr. Bliss, do you have with you the information that you can give us with regard to the amount of the contributions to the Guaranty Fund that have been made by the state banks?

A. Yes, sir.

526 Q. When, what date were the special assessments first assessed against the state banks? In what year?

A. In 1911.

527 Q. What year did you say the first special assessment was assessed against the state banks?

A. 1911.

528 Q. Now, wasn't it 1919 the first special assessment was made?

A. You said special assessment. I understood you to say first assessment. Yes.

529 Q. The first special assessment was made in 1919, was it?

A. I haven't that data with me. I asked for it but I guess it is on my desk.

530 Q. Well, could you tell by the amount of the assessments you have as to when the first special assessment was levied? Wasn't there one special assessment levied in 1919?

A. Well, the amount of money raised here in 1916, $416,000, that is more than a regular assessment.

531 Q. Now in 1919 what was the assessment that the [fol. 104] state banks paid to the Guaranty Fund?

Mr. Abbott: Objected to as immaterial, incompetent and irrelevant.

Mr. Campbell: Same objection.

The Court: Overruled.

Exception.

A. In 1919 the assessment paid to the Guaranty Fund was $802,476.74.

532 Q. And in 1920 how much was it?

A. $639,243.93.

533 Q. Six hundred thirty-nine thousand?

A. Yes, sir.

534 Q. And in 1921?

A. $2,317,870.70.

535 Q. In 1922?

A. $1,971,579.92.

Mr. Abbott: You are referring to both the general and the special assessments, I take it.

Mr. Flansburg: My question was how much did they pay, that would be the total amount.

536 Q. In 1922 it was what, did you say?

Mr. Abbott: Objected to as immaterial.

Mr. Campbell: As to intervenors we wish the objection made to the first question to apply to each question put on these payments.)

The Court: He may answer.

Exception.

537 Q. In 1922 the amount paid then?

A. $1,971,579.92.

538 Q. And in 1923?

[fol. 105] A. $2,046,320.39.

539 Q. And in 1924?

A. $1,004,860.01.

540 Q. And in 1925?

A. $1,616,329.85.

541 Q. And in 1926?

A. $1,672,339.75.

542 Q. And in 1927?

A. $1,653,206.76.

543 Q. And in 1928?

A. $885,412.60.

544 Q. And there is still the special assessment which is being contested in this suit, unpaid for 1928?

A. Yes, sir.

545 Q. And what is the total amount of that assessment?

A. I don't have that exactly, in my file here.

546 Q. Isn't it $622,947.76, isn't that the amount of the special assessment of December 15th?

A. As I recall, yes.

547 Q. That makes a total then, that the banks have paid into the Guaranty Fund since 1919 of over $15,300,000?

Mr. Sorenson: Objected to as immaterial and incompetent.

Mr. Flansburg (hands witness paper and asks):

548 Q. Check this over and give us the total of the assessments paid in since 1919 down to and including 1928, not including the special assessment that is being contested.

[fol. 106] A. According to the adding machine slip it is $14,609,576.65.

549 Q. That's been paid into the Guaranty Fund since 1919?

A. Yes.

550 Q. Isn't it a fact, Mr. Bliss, that the first special assessments began in 1919?

Mr. Abbott: Objected to as witness has already answered that he is unable to state from the records he has with him and there might have been on in 1916.

The Court: I think he said he couldn't remember.

Witness: I can get that data but I don't have it here, on that subject.

551 Q. Now, Mr. Bliss, can you tell us during that period, 1919 down to and including 1928, how much stockholders had contributed to repair capital stock?

Mr. Abbott: Objected to as incompetent and immaterial. Makes the further objection to all evidence of this class as wholly immaterial.

The Court: Overruled.

Exception.

Mr. Campbell: For the intervenors add to the objection no foundation laid.

Mr. Ferneau: And not the best evidence.

The Court: Overruled.

Exception.

552 Q. As taken from your records can you give us that information?

A. I can give it in part.

[fol. 107] 553 Q. As to how many banks can you give that information?

A. 618 banks.

554 Q. Now, will you give me the amount, year by year, that the stockholders in those banks contributed?

Mr. Campbell: Objected to as incompetent, irrelevant and immaterial and no proper foundation laid.

The Court: Overruled.

Exception.

A. First assessment paid by stockholders in 1920, $6,044.01.

555 Q. 1921?

A. $175,961.24. In 1922, $258,378.24. 1923, $225,435.75. 1924, $220,056.51. 1925, $404,738.29.

556 Q. And the next year, 1926?

A. $164,843.27. 1927 is $196,458.12.

557 Q. And in 1928?

A. $454,766.72.

558 Q. Now, what is the aggregate, the total paid in by these stockholders in these banks you describe?

A. $2,106,682.15.

559 Q. And your record is not complete as to all assessments paid in?

A. We don't seem to get reports from all of the banks.

560 Q. What is the present capital of all the 726 banks in the State of Nebraska?

Mr. Abbott: Object as incompetent and immaterial.

The Court: Overruled.

Exception.

[fol. 108] A. $19,001,000 in 726 banks reporting December 31st.

561 Q. What were the total deposits of state banks in 1919?

Mr. Abbott: Object as incompetent, irrelevant and immaterial.

The Court: Overruled.

Exception.

A. The last call report for 1919 the total deposits of 937 banks is $276,429,320.93.

562 Q. What are the deposits in the banks, state banks in the year 1928?

Mr. Abbott: Object to question as incompetent and immaterial.

The Court: Overruled.

Exception.

563 Q. As of December 31, 1928?

Mr. Campbell: Object as no foundation laid.

The Court: Overruled.

Exception.

A. The deposits were $252,375,577.95.

564 Q. The total deposits then, in 726 banks was about twenty-four million less than in 937 banks in 1919?

Mr. Abbott: Objected to as immaterial, incompetent and argumentative and not reflecting the true condition in that it fails to include the deposits in failed banks that made up approximately the difference.

The Court: He may answer.

Exception.

A. Yes, sir.

565 Q. Now, Mr. Bliss, can you give me the amount of the real estate, other than the real estate used by the bank for its own office, carried on the books of the state banks, [fol. 109] the aggregate in 1919?

Mr. Abbott: Objected to as incompetent, immaterial and irrelevant, not the best evidence, and no sufficient foundation laid and no qualification shown. This objection is made to all questions along this line.

Mr. Flansburg: I am asking you, Mr. Bliss, to testify as to information taken from your records.

By Mr. Abbott:

566 Q. Mr. Bliss, referring to the testimony that you have given this morning with respect to statistical data I will ask whether you are testifying from a compilation which you hold in your hand?

A. Yes, sir.

567 Q. The compilation was made by you?

A. Yes, sir.

Mr. Abbott: In view of the answers of the witness we object to the continuance of this line of testimony for the reason that the statistics in the paper in his hand is the best evidence and will greatly facilitate this trial and we offer no objection to it, except as to the competency and materiality.

The Court: Objection overruled.

Exception.

A. Yes, I can.

568 Q. What was the aggregate carried on the books as other real estate at that time?

A. The last call for November, 1919?

569 Q. Yes.

[fol. 110] A. 937 banks reporting shows $641,450.88.

570 Q. And what was the total of the capital of the banks reporting in 1919?

A. The capital was $24,881,800.

571 Q. Now, what is the present real estate carried on the books of the banks at this time?

A. The last call report of December shows 726 banks reporting and real estate $9,872,647.21.

572 Q. Now, Mr. Bliss, I wish you would explain how it happens that in 1919 when the banks had a capital of twenty-four million they only had six hundred forty-one thousand in real estate and now, with a capital of nine-

teen millions they have an approximate amount of half or ten million in real estate?

Mr. Ferneau: Objected to as irrelevant, incompetent and immaterial, calling for the opinion and conclusion of the witness, no proper foundation laid and argumentative.

Mr. Campbell: The same objection applies to intervenors.

The Court: He may answer.

Exception.

A. The same process under which they acquired real estate in 1919 has just been increased until it has reached nine millions.

573 Q. What is the reason the real estate item has increased each year?

Mr. Abbott: Objected to as no foundation laid, call-
[fol. 111] ing for the conclusion of the witness, goes beyond the records and is mere speculation.

The Court: He may answer.

Exception.

574 Q. Why is it, Mr. Bliss, is real estate supposed to be a good investment for a bank?

Mr. Abbott: Objected to as implying that the banks invested capital in this real estate and for the further reason it calls for mere conclusion of the witness.

The Court: He may answer.

Exception.

A. I haven't any other idea than that that acquired back in 1919 is the same thing right down to 1928.

575 Q. Is it a healthy condition for a bank to have half its capital in real estate?

Mr. Abbott: Object as incompetent and immaterial, calling for mere conclusion.

The Court: He may answer.

Exception.

A. I would say these banks prefer not to carry their funds in real estate.

576 Q. It has been involuntary then, this condition?

Mr. Abbott: Objected to as no foundation laid.
The Court: Overruled.

Exception.

577 Q. Do you know, Mr. Bliss, as to how this item is carried on the books, carried at the acquired price or at their actual value?

Mr. Abbott: Objected to as no foundation for the question, for this particular question for the reason that it isn't [fol. 112] shown that the witness knows and manifestly as to different banks it would be carried in different ways; the question is entirely unfair in this case.
The Court: He may answer.

Exception.

A. I know the theory under which it is carried.
578 Q. Do you know from the information you have gathered as Secretary of the Department of Trade and Commerce whether that item, ten million dollars real estate, is about the actual value of the property it represents?
A. I don't know that.
579 Q. Your examiner's report shows whether the real estate is carried at an excessive valuation, does it not?

Mr. Campbell: Object as not best evidence.
The Court: Overruled.

Exception.

A. Yes.
580 Q. Now, from that information you now whether some of these banks carry this item of real estate in excess of its actual value, do you not?

Mr. Abbott: Object to this line of questioning as manifestly unfair and prejudicial; it should be confined to the condition of all the banks or of a group of banks and we cannot show without special inquiry as to which particular bank it refers to and we submit it is an untair question.
Mr. Campbell: Intervenors object as it calls for a conclusion on reports which are not before the court and which [fol. 113] are the best evidence.
The Court: He may answer if he can.

Exception.

A. I don't know that I know that and as to opinion, that is purely a matter of guess. Anybody will tell you that real estate is a guess these days. I would like to say something more if I may. The theory of the statute on taking real estate is that a bank shall enter it on the books at the amount at which it is acquired. Many banks reporting this real estate will pay out and have a profit in their real estate account. Some others may have acquired pieces of land at more than it might be worth. What it is worth is a matter of guess; one man's guess is as good as anothers.

581 Q. Isn't it a fact that your examiner's reports and your records show that this item of real estate is carried at an excessive value in a great many instances?

Mr. Abbott: Objected to as witness having already answered, that argument being that this "item" refers to approximately ten million dollars.

The Court: He may answer.

Exception.

A. No, it is not a fact.

582 Q. Now, you don't know whether it is a fact or not, do you, Mr. Bliss?

Mr. Abbott: Objected to as cross examining his own witness.

The Court: Overruled.

Exception.

[fol. 114] A. I don't know the values of the land. Now as to it being carried at an excessive value, the examiner is in the same position as I am. They don't know it either. That is one thing we don't argue much in these reports. That matter, I don't know.

583 Q. Mr. Bliss, about a year ago did you work with a committee examining the examiner's reports and records in your files to determine conditions of the banks with respect to carrying notes as assets?

A. Yes.

584 Q. Who was this committee you worked with?

A. A committee of bankers.

585 Q. Appointed by whom?

A. Appointed by the Governor, called in by the Governor, I believe.

586 Q. And in that examination did you ascertain from your examiners' reports how many banks there were that were carrying notes as assets that the examiners had ordered charged off?

A. Yes.

587 Q. And did you determine how many of the banks would have their capital impaired if the notes that were classed as assets had been charged off according to the examiners' requests?

A. The committee did.

588 Q. And from your examination, you determined from the examination of the reports?

Mr. Abbott: Object to this line of questions. I have no [fol. 115] objection to counsel asking the witness what the committee did, and further I object as incompetent, irrelevant and immaterial.

The Court: He may answer.

Exception.

A. Yes, sir.

589 Q. And what did you find from that examination to be the fact, how many banks would have had their capital impaired if they had charged off the notes as examiners required?

Mr. Abbott: Object as immaterial.

Mr. Campbell: Intervenors object as incompetent, immaterial and being what might be described as loaded questions, assuming facts not in evidence.

The Court: Overruled.

Exception.

A. That is covered by your Exhibit No. 4, I believe, which refers to the Governor's Committee.

590 Q. Just answer my question as to how many banks would have had their capital impaired?

Mr. Abbott: Objected to as incompetent, irrelevant and immaterial, not the form of the question but make it in the foundation laid.

591 Q. How many banks would have had their capitol impaired if they had charged off the paper as required by the examiners?

Mr. Abbott: Objected to as incompetent and immaterial, [fol. 116] no proper foundation laid, asking for a question of fact.

The Court: He may answer if he knows.

Exception.

592 Q. Mr. Bliss, didn't you tell me the other day it was between 350 and 400 banks that would have had their capital impaired?

Mr. Abbott: Objected to as incompetent and immaterial.

593 Q. Is that a fact?

A. No, we were talking about——

Mr. Abbott: Object to question as to what witness told the attorney as an improper question.

The Court: Overruled.

Exception.

594 Q. Refreshing your recollection, Mr. Bliss, didn't you tell me that between 350 and 400 banks would have had bad capital impairment if they had charged off the paper as required by the examiners?

A. I told you, Mr. Flansburg, there was 350 or 400 banks involved in that report that would have had some reduction of capital.

595 Q. If they had charged off the paper as required by the examiners?

A. I don't know as to whether the examiners required it but it was taken up in that committee.

596 Q. Without referring to the report of this committee, didn't you tell me, refreshing your memory, that be- [fol. 117] tween 350 and 400 banks would have had their capital impaired if they had charged off paper which the examiners requested should be charged off?

Mr. Abbott: Objected to as immaterial and incompetent, same question as was asked before.

The Court: Overruled.

Exception.

A. Yes, it would affect their capital if those losses were charged off immediately, at that time.

597 Q. As ordered by the examiners?

A. It wasn't what was ordered.

598 Q. If the notes requested to be charged off by the examiners had been charged off it would have impaired the capital of these 350 or 400 banks, wouldn't it?

A. It would have, slightly.

599 Q. 350 or 400 banks would have had their capital impaired?

A. It is covered by this report. I don't, I never said there was more than the banks covered by this report.

600 Q. How many were covered by the report, do you remember?

A. Yes, sir, there is 820 banks in this report and they are divided into six classes.

601 Q. Never mind, I am not asking about the report. Now, Mr. Bliss, did you tell me the other day, refreshing your memory, that 350 to 400 banks would have had their capital impaired if the notes recommended to be charged off had been charged off?

Mr. Campbell: Objected to as having been answered.

[fol. 118] The Court: Overruled.

Exception.

602 Q. Did you tell me the other day that 350 to 400 banks would have had their capital impaired if the notes recommended to be charged off had been charged off?

A. I think you asked me that question and I said it was partially so.

603 Q. I didn't ask you that question, Mr. Bliss.

A. I think I said that is probably so.

604 Q. I think you suggested the question yourself.

A. Yes, you did.

605 Q. Now, what is the fact, how many would have had capital impairment?

Mr. Campbell: Objected to as no sufficient foundation laid, irrelevant, incompetent, and immaterial, no period stated.

The Court: Overruled.

Exception.

A. The committee's——

606 Q. No, I am not asking about the committee's report.

A. All right, the banks had losses then. That would have made their capital impaired. And my answer would be we had about sixty banks with their capital pretty well gone and some more than gone and we had one hundred banks with some very small impairment, up to half the capital.

607 Q. Now give me the total number.

A. That would run 160 banks, it would run 160 banks, I think.

608 Q. And what about this 350 or 400 banks, what about them? Would they have had their capital impaired if they [fol. 119] had charged off the notes as recommended?

A. Not to any great extent; the 160 were the only ones really in very bad condition.

609 Q. The rest of the 350 were impaired to a slight extent?

A. Some very slight extent.

610 Q. Now, Mr. Bliss, we have set out the date when each of these banks described in our petition was chartered. Do you have the date of these charters in your office?

A. Yes.

611 Q. Will you verify the dates in our petition, the time that the last charters were granted?

Mr. Abbott: We will admit dates set forth are the dates subject to our checking hereafter and will challenge attention to any dates that are not correct.

612 Q. How much, what is the amount of the deposits in the trust companies, do your records show, as of December 31, 1928?

Mr. Abbott: Objected to as immaterial.

Mr. Campbell: Intervenors object as incompetent and immaterial.

The Court: Overruled.

Exception.

A. The trust companies do not report the same as the banks. I could give you a compilation of the trust companies.

613 Q. What is the total of the building and loan companies?

A. Approximately 100 million less than the banks.

614 Q. And the trust companies, can you approximate that?

[fol. 120] A. There are only a few trust companies in Nebraska.

615 Q. How many building and loan companies are there reporting?

A. Eighty-four.

616 Q. And how many trust companies reporting?

A. There are twenty-four trust companies reporting.

617 Q. How many savings banks?

A. Savings banks are listed with regular banks and are handled under the law the same as a regular or commercial bank. I think there is only about two or three.

618 Q. Mr. Bliss, for all the work in examining the trust companies, savings banks, commercial banks and building and loan associations you have allowed thirteen examiners, is that correct?

A. Yes, sir.

619 Q. How many assistants have you in your own office, aside from these thirteen examiners?

A. Two extra clerks besides the stenographer and then in addition to that these same examiners.

620 Q. Do you have the Insurance Department?

A. That is a Bureau by itself.

621 Q. But that is under your Department?

A. Yes.

622 Q. As a part of your supervision you have to go over all their policies?

A. Yes, sir.

Mr. Flansburg: That is all.

[fol. 121] Cross-examination.

By Mr. Abbott:

623 Q. Mr. Bliss, you testified that on December 31, 1928, the banks had a capital stock of $19,001.00. Did they have any other invested capital other than capital stock?

Mr. Flansburg: Object to that as not cross-examination.
The Court: Objection sustained.

Exception.

624 Q. Mr. Bliss, in testifying to the figures that you have with respect to conditions in November, 1919 or late in 1919 and in 1928, have you testified from an original compilation of your office which you now have present in court with you?

A. Yes, sir.

625 Q. And does that compilation, Mr. Bliss, show the related figures for the same period and have a bearing upon the figures that you have given?

Mr. Flansburg: Objected to as not proper cross-examination.
The Court: Objection sustained.

Exception.

626 Q. Mr. Bliss, you testified that on December 31, 1928, the deposits in 726 banks aggregated $252,375,577. Were the other banks whose deposits were not included in that trusts?

A. Yes, not under our Department.

627 Q. Were they under another Department?

Mr. Flansburg: Objected to as not cross-examination.
[fol. 122] The Court: Overruled.

Exception.

A. There were some banks in the Commission.

628 Q. And the deposits of those banks were not included in your total?

A. Not in that total.

629 Q. No. Do you have with you any data of your office from which you can state the amount of the deposits then in these additional banks on December 31, 1928?

A. No, I don't.

630 Q. You heard Mr. Peterson testify here yesterday, did you? Would that be the deposits he testified to?

Mr. Flansburg: Objected to as calling for conclusion and hearsay.

631 Q. Would that be the deposits you refer to under his jurisdiction, be those he testified to as being in certain banks?

Mr. Flansburg: Objected to as trying to embody part of Mr. Peterson's testimony in this examination.

The Court: He may answer.

Exception.

A. Yes, the banks operated by the Guaranty Fund as going banks are not included under our reports in the Bureau of Banking.

632 Q. That is, they are not included in the 726?

A. No.

633 Q. Now you testified, Mr. Bliss, that the capital stock of the 726 banks was $19,001,000 on December 31, 1928. Is the capital stock of the other banks included in that amount?

[fol. 123] Mr. Gaines: It is admitted that the figures given by Mr. Bliss do not cover banks in the hands of the Guaranty Fund Commission or in the hands of receivers.

634 Q. These Guaranty Fund levies, Mr. Bliss, that you testified to as having been paid by the banks during the ten year period, do those include both general and special assessments?

A. Yes.

635 Q. Now in the matter of assessments paid in by stockholders through this ten year period, the sum $2,100,000 averages about 200,000 a year. What occasioned the paying in of those assessments and what was the purpose?

A. The purpose was to take out criticised paper.

636 Q. Criticised loans of the officers?

A. Of the banks.

637 Q. Of the banks. Now then, when had the losses,—were the loans that resulted in the necessity later for these assessments largely made?

Mr. Flansburg: Object as no foundation laid, not proper cross examination.

The Court: Objection sustained.

Exception.

638 Q. Mr. Bliss, are you familiar with the making of these assessments?

A. Yes.

639 Q. And they are shown by the records of your office?

A. Yes.

[fol. 124] 640 Q. Now these assessments were made for the purpose of restoring impaired capital, were they?

A. Yes, sir.

641 Q. And in many instances they were voluntary and in other instances required by your Department?

A. Yes, sir, both ways.

642 Q. Both ways. Now, do you know what occasioned the impairment of the capital making these assessments for payments necessary by the stockholders, do you know?

A. As a general thing, I know.

643 Q. You may state.

Mr. Flansburg: Objected to as calling for conclusion, no foundation made and not cross examination.

The Court: Overruled.

Exception.

A. Generally from bad loans.

644 Q. Generally speaking when made?

Mr. Flansburg: Object as no foundation laid, and not cross examination.

The Court: Sustain the objection.

Exception.

Redirect examination.

By Mr. Flansburg:

645 Q. How many banks were there whose stockholders contributed to repair capital, of the $2,100,000; how many different banks were involved?

A. I couldn't tell definitely, it is spread out over a long period.

[fols. 125 & 126] 646 Q. Well, wasn't it 242? Wasn't that the figure you gave me?

A. Well, it was around 240 banks; it would be only an estimate.

647 Q. Will you get the exact figures and give them to me?

A. It wasn't a full report of all the banks.

648 Q. There are other banks besides the ones you testified to?

A. You already knew there were 618.

649 Q. How many banks whose stockholders contributed to repair capital?

Mr. Flansburg: We offer in evidence Exhibit No. 9.

Exhibit No. 9 received in evidence, is attached to and made a part of this Bill of Exceptions, at page 126 hereof.

Whereupon adjournment was taken until one thirty P. M. of the same day, at which time the following proceedings were had:

[fol. 127] Mr. F. J. Svoboda, called as a witness on behalf of the plaintiffs, after being duly sworn, testified as follows:

Direct examination.

By Mr. Sidner:

650 Q. Mr. Svoboda, where do you live?

A. At Abie, Nebraska.

651 Q. How long have you resided there?

A. About twenty-two years,—twenty-three.

652 Q. What is your occupation?

A. Banking.

653 Q. How long have you been engaged in that occupation?

A. Seventeen years.

654 Q. With what bank are you connected?

A. The Abie State Bank.

655 Q. In what official position?

A. As cashier.

656 Q. Have you been such cashier all that time?

A. Yes, sir.

657 Q. As such cashier have you been the chief, active officer in that bank for seventeen years?

A. Yes, sir.

658 Q. Where is Abie located?

A. It is in the eastern part of Butler County.

659 Q. And how far is the Saunders County line?

A. Two or three miles.

660 Q. Is that town on the railroad?

A. Yes, sir.

[fol. 128] 661 Q. About how large is the town?

A. About two hundred people.

662 Q. What is the nature of the country surrounding that town?

A. Agriculture country.

663 Q. How many banks are there in Abie?

A. Just one.

664 Q. Have there been more banks in that town since you have been there?

A. No.

665 Q. What is the size of the capital of your bank?

A. $15,000.

666 Q. And what is the surplus?

A. $2,500.

667 Q. In the seventeen years that you have been managing that bank have you given it your own personal undivided attention?

A. Yes, sir.

668 Q. You have had no other occupation?

A. No, sir.

669 Q. Since 1920 has your bank paid any dividends?

A. We paid in 1921, I think we paid a dividend in 1921.

670 Q. Have you since that time?

Mr. Abbott: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

Exception.

A. We paid one in 1926.

671 Q. Have you at any time since then paid any dividend?

[fol. 129] A. No, sir.

672 Q. How many people are employed in that bank?

A. Two.

673 Q. One other person beside yourself?

A. Yes, sir.

674 Q. Are all the earnings of yourself and the other person put into the earnings of the bank?

A. Yes, sir.

675 Q. Do you do an insurance business on the side, write fire and life insurance?

A. Yes, but we put profits from insurance into the bank, yes, sir.

676 Q. Do you also do a land business, sell on commission?

A. Yes.

677 Q. And where do those profits go?

A. Also to the bank's profit.

678 Q. So that all the money you make outside of strictly banking business, the profits have gone into the bank?

A. Yes, sir.

679 Q. Is that true as to everybody connected with it?

A. Yes, sir.

680 Q. What per cent dividend did you pay in 1926?

A. Six per cent.

681 Q. Mr. Svoboda, can you tell us how much the profits that you made out of insurance and commissions in 1928 that went into the profits of the bank amounted to?

Mr. Abbott: Object as immaterial and irrelevant.

[fol. 130] The Court: He may answer.

Exception.

A. I don't remember exactly in 1928.

682 Q. Have you got the information before you, can you refresh your memory from one of the reports you made to the Department?

A. Yes, sir.

683 Q. I hand you two papers and will ask you to see if from an examination of those you can refresh your memory?

A. I will have to add this up. This report shows we made $587.61.

684 Q. You made that out of commissions and insurance?

A. Out of commissions and insurance, yes, sir.

685 Q. Now, with those amounts included in the profits of your bank, can you tell us how much your net profits from the operation of that bank were for the year 1928?

A. $333.05.

686 Q. Do you know what the special assessment was, the amount of your special assessment that was claimed to have been levied in December, 1928?

A. Four hundred fifty nine dollars and some odd cents but four hundred fifty nine dollars.

687 Q. That assessment was charged out of your profits?

A. It wasn't paid.

688 Q. If that had been paid it would have taken more than you made that year?

Mr. Abbott: Objected to as a mathematical computation.

The Court: Objection sustained.

Exception.

[fol. 131] 689 Q. Mr. Svoboda, can you tell us what the salaries were that were paid by your bank for the year 1928?

A. $3,180.

690 Q. That is the total salaries for the year?

A. Yes.

691 Q. Have you any information with you that will show how much was turned into the profits in 1926 from land commissions and insurance premiums?

A. I think I have it here. Had it in my income tax reports. (Referring to papers.) In 1926, $806.80.

692 Q. That is the amount that was turned in from land sales and insurance?

A. Yes, sir.

693 Q. What would be the amount in dollars of the dividend you paid that year?

A. $900.00.

694 Q. During the other years that you did not pay dividends were your earnings sufficient to pay dividends?

Mr. Abbott: Objected to as not the best evidence, immaterial, calling for an opinion.

The Court: He may answer.

Exception.

A. In 1927 we had net profit of $195.17 at the end of the year.

695 Q. That was the net profit for the year 1927?

A. 1927.

696 Q. Have you it for 1925?

A. Yes, sir. In 1925 it was $1,942.32. That was carried [fol. 132] over to 1926 and the dividend paid in 1926.

697 Q. Then what was the net profit in 1926?

A. $1,245.51.

698 Q. And what was done with those profits of 1926?

A. They were carried on to the next year, were not divided that year.

699 Q. And what was done with those profits in 1927, with this 1926 profit?

A. Our report for 1927 shows profit $195.17.

700 Q. What had become of the $1,245 carried over from 1926?

A. I see here we paid $1,000 on notes that we charged off.

701 Q. So you took $1,000 of the $1,245 to charge out on notes?

A. Yes, we got that included in the expenses for 1927.

702 Q. What undivided profits do you have at the present time?

A. Right at this date?

703 Q. Well, as of December 31, you probably don't have anything later.

A. $333.00.

704 Q. Just the amount carried over?

A. Yes, sir.

705 Q. Then the profits for the preceding years, other than what you declared as dividends in 1926 have been absorbed?

A. Yes, sir.

706 Q. And not paid out in dividends?

A. No, sir.

707 Q. What was done with the profits of 1926 and 1927, other than the payment of this dividend?

[fol. 133] A. We paid dividend of six per cent in 1926; that was $900.00. Carried $500.00 to surplus fund.

708 Q. What was done with the balance?

A. Carried over to the next year.

709 Q. And what was done then?

A. In 1927 we charged off notes, $1,000.

710 Q. So that for the several years from 1921 on, the profits made for those years have been expended,—$900.00

for a dividend in 1926, $500.00 to surplus and you now have on hand as undivided profits $333.05?

A. Yes, sir, that was the end of the year.

711 Q. And that leaves this bank assessment claim unpaid?

A. Yes, sir.

Mr. Sidner: That is all.

Cross-examination.

By Mr. Abbott:

712 Q. Mr. Svoboda, what were your net earnings in 1921?

A. $1,234.24.

713 Q. What losses, if any, did you charge off in that year?

A. We didn't charge off any in that year. It don't show on my report here.

714 Q. What were your net earnings in 1922?

A. $475.66.

715 Q. And what losses did you charge off in that year?

A. We didn't charge off any that year.

[fol. 134] 716 Q. And in 1923?

A. $315.72.

717 Q. And your losses?

A. No losses were paid that year.

718 Q. And 1924?

A. $1,221.99.

719 Q. What losses were charged off that year?

A. No losses were charged off that year.

720 Q. Now what salary have you been drawing as executive manager or as the manager of the business?

A. I am drawing now $135.00 a month. I have been for the last two years. Before that I had $130.00.

721 Q. Have you drawn any larger amount than that at any time?

A. No, sir.

722 Q. Are you the owner of the majority of the stock of the bank?

A. Yes, sir.

723 Q. Of the one hundred fifty shares how many do you own?

A. One hundred twelve and a half.

724 Q. Do you own one hundred twelve and a half of the one hundred fifty shares?

A. Yes, sir.

725 Q. And of whatever profit the bank produces you get that proportion?

A. Yes, sir, or loss.

726 Q. You have testified as to profits since 1921?

A. A little profit in insurance.

727 Q. Who is the other man in the bank?

[fol. 135] A. Mr. Rohr.

728 Q. How many shares does he own?

A. Eighteen.

729 Q. Now during these years, Mr. Svoboda, you made the net profits that you have testified after paying all other expenses and paying the Guaranty Fund special assessment and the regular assessment?

A. All the special assessments until the last one.

730 Q. And the regular assessments?

A. All the regulars.

731 Q. Is Abie an incorporated town?

A. An incorporated town.

732 Q. You say about two hundred?

A. Yes, sir.

739 Q. And what are your deposits?

A. At the end of the year $182,000.

734 Q. And then what were your loans and discounts?

A. $159,000 if I remember right, I am not positive on that.

735 Q. Now what amount of that, of those loans and discounts of $159,000 are what might be called frozen and on which you are not collecting current interest?

A. On, around about $4,000 I believe.

736 Q. $4,000 of the loans, you mean interest and principal?

A. $4,000 of loans.

737 Q. How much real estate have you?

A. We got $4800 other real estate.

738 Q. What rate of interest do you charge on loans, Mr. Svoboda?

[fol. 136] A. 7%.

739 Q. 7%. For the semi-annual period ending December 31, 1928, what amount of other expenses did you have other than salaries and wages?

A. I couldn't say off hand, I would have to look at the report.

740 Q. Well, refreshing your recollection from the report you find $1,439.75 for the semi-annual period. Does that include some charge offs?

A. Yes, sir.

741 Q. How much?

A. $690.70, I think, on a note.

742 Q. And refreshing your memory, I note an item of $1,834.88 interest on deposits. What rate of interest do you pay on deposits?

A. Four per cent.

743 Q. Four per cent. Your gross earnings for the six months period ending December 31, 1928, Mr. Svoboda, seem to have been $5,088.26, is that the way you recall it?

A. I would have to see the report.

Mr. Abbott: I withdraw the question.

744 Q. Mr. Svoboda, for the six months ending December 31, 1928, you may state for the record the amount of your gross earnings and the source.

A. $5,343.55.

745 Q. Give the source.

A. Earnings on interest on loans was $5,088.26; commission on farm loans, etc., $106.71; commission on insur-

[fol. 137] ance, $148.58.

746 Q. Of that amount, what did you pay out in salaries?

A. $1,590.00.

747 Q. And interest on deposits?

A. $1,834.88.

748 Q. And on other expenses?

A. Taxes, $57.00 and Depositors' Guaranty Fund $91.88 and all other expenses were $1439.75.

749 Q. Now, how close to you are the other banking towns?

A. How close?

750 Q. Yes sir.

A. Four miles.

751 Q. Four miles. And what place is it that is four miles distant?

A. Bruno.

752 Q. How many banks there?

A. Two banks.

753 Q. What is the next closest place?

A. Linwood.

754 Q. How far is that?

A. Six miles.

755 Q. How many banks there?

A. One.

756 Q. And the next closest town?

A. The next one is nine miles.

757 Q. How far away is the county seat?

A. Fifteen miles.

758 Q. What is the county seat?

A. David City.

[fol. 138] 759 Q. Now these other tow-s compete strongly with you for deposits?

A. They are strong competitors.

760 Q. And your inability to make larger earnings are largely influenced, are occasioned by your inability to get a large amount of deposits, is it not? In other words, your deposits are out of proportion to your expenses?

A. Well, larger deposits would bring more profits.

761 Q. Well, that is the chief cause, is it not?

A. I don't know just what causes——

Mr. Sidner: Object to this as calling for conclusion or opinion of the witness and not cross examination.

The Court: Overruled.

Exception.

762 Q. Now, during the six months period ending June 30, 1928, what were your gross earnings?

A. $6,860.13.

763 Q. You may state for the record what disposition was made of that $6,860.00.

A. Salaries was $1,590; interest on borrowed money was $115.50; interest on deposits was $3,972.50; taxes were $157.08; Depositors' Guaranty Fund was $596.24; other expenses were $425.80.

764 Q. And what amount of the gross earnings was commission on insurance and lands?

A. Commission is $115.00 and insurance was $217.10.

765 Q. Now, for the six months period ending December 31, 1927, what were your gross earnings?

[fol. 139] A. $4,779.99.

766 Q. Did that include $205.36 carried over from a previous report?

A. Yes.

767 Q. Mr. Svoboda, are these figures you testified to with respect to these several six months periods typical of the operation of your bank since 1921, that is about the same through that period?

A. Yes, sir.

768 Q. And referring to the interest that you have been paying through the period on moneys, does that include some public funds?

A. No, sir.

769 Q. Well, you have had——

A. Just a moment, you asked the interest we are paying on money?

770 Q. If this interest included the payment of interest on public moneys?

A. Yes, sir.

771 Q. And, Mr. Svoboda, referring to these earnings you have had during the years and which seem to have been in excess of all Guaranty Fund assessments, how did you happen to bring this suit, or did you bring it?

Mr. Sidner: Objected to as incompetent, immaterial and irrelevant, not proper cross examination.

The Court: Sustained.

Exception.

772 Q. Did you file this suit, Mr. Svoboda?

Mr. Sidner: Object as incompetent, immaterial and [fol. 140] irrelevant, and petition is on file here.

The Court: Sustained.

Exception.

773 Q. What is your relation to the other state banks listed in the petition in this matter, Mr. Svoboda?

Mr. Sidner: Objected to as incompetent, irrelevant and immaterial, not proper cross examination.

Mr. Abbott: Withdraw the question.

774 Q. Mr. Svoboda, did you know of the fact of the filing of this suit in the name of the Abie State Bank?

Mr. Sidner: Objected to as not the best evidence.
The Court: Overruled.
Exception.

A. I didn't know it would be filed in the name of the Abie State Bank but I knew they was going to file a suit.
775 Q. Who was going to file a suit?
A. The attorneys.
776 Q. What attorneys?
A. Mr. Sidner.
777 Q. Did you authorize the filing of the suit in the name of the Abie State Bank?

Mr. Sidner: Objected to as calling for conclusion.
The Court: Overruled.
Exception.

A. I didn't authorize it because I didn't know in whose name it would be filed, I know I had joined with the rest of the banks in filing a suit.
778 Q. With what other banks?
A. They sent out circulars stating one hundred or more banks had already joined in that and if we wanted to join, all right, and if not, we didn't have to, but we did join.
[fol. 141] 779 Q. Join in authorizing this suit?
A. Yes, sir.
780 Q. And you made some contribution to the expenses?

Mr. Sidner: Objected to as immaterial and irrelevant and beyond the scope of the direct examination.
The Court: You may answer.

Exception.

A. Yes, sir.
781 Q. Did you ever authorize any attorney to file suit in the name of the Abie State Bank?

Mr. Sidner: Objected to as already asked and answered.
The Court: Sustained.

Exception.

782 Q. When did you first learn that the Abie State Bank had filed suit in court?

A. I don't remember the date but it was shortly before New Years.

783 Q. Shortly before New Years. And how did you learn that?

A. I was told that by another person.

784 Q. By an attorney in the case?

A. No, not an attorney.

785 Q. By anybody interested in the case?

A. I was told that by a man listening on the radio. It was broadcasted, that is what the man told me, the suit was filed.

786 Q. Well, Mr. Svoboda, do you wish this case, Mr. Svoboda, to continue in the name of the Abie State Bank and continue for the Abie State Bank?

[fol. 142] Mr. Sidner: Objected to as incompetent, immaterial and irrelevant, and not proper cross-examination.

The Court: He may answer.

Exception.

A. Yes, sir.

787 Q. That is—and in its name?

A. Yes, sir, as it is already filed.

788 Q. But as for filing the original suit in your name to contest these Guaranty Fund assessments——

Mr. Sidner: Objected to as not proper cross examination and as having already been answered.

The Court: Sustained.

Exception.

Redirect examination.

By Mr. Sidner:

789 Q. Mr. Svoboda, you knew this case was to be brought?

A. Yes, sir.

790 Q. And you left the matter of how, when and where to the judgment of your attorneys, did you not?

A. Yes, sir.

791 Q. And you knew that some five hundred odd banks were joining in the matter, is that correct?

A. That was my understanding.

792 Q. And the name of your bank, the Abie State Bank, do you know where that appears on the list of state banks in the state?

[fol. 143] A. It is the first one.

793 Q. The first one. Now, Mr. Svoboda, did you at any time charge out any items that were not requested to be charged out by the examiners?

A. We did one charge off.

794 Q. And what was that?

A. One of a loan of $558.00.

795 Q. Was it paid?

A. No, sir.

796 Q. Was it a complete loss?

A. Yes, sir.

797 Q. Have you been able from your earnings to charge out all the paper the examiners requested?

Mr. Abbott: Objected to as incompetent and immaterial.

The Court: He may answer.

Exception.

A. No, sir.

798 Q. Why did you not charge out all that they asked you to?

Mr. Abbott: Objected to as calling for conclusion of the witness.

The Court: He may answer.

Exception.

A. Because we didn't have enough profits to charge them off.

799 Q. The question of the real estate was brought up. That is an equity in real estate?

A. Yes, sir.

800 Q. There is a mortgage ahead of yours?

A. Yes, sir.

[fol. 144] Recross-examination.

By Mr. Abbott:

801 Q. Mr. Svoboda, this equity, Mr. Svoboda, is an equity in a farm you made a large loan on to your brother-in-law or to your brother, J. W. Svoboda?

A. Yes, sir.

802 Q. And you took over that equity from him and these other loans the Department complained of are loans made to other relatives at different times, is that not true?

A. Well, the ones we should charge off we did, but not to relatives.

803 Q. Well, that isn't what I am referring to. You have a number of notes which you have referred to in the bank that the Department has criticised. They are made to your relatives?

A. Yes.

804 Q. In what amount have you got loans to your relatives?

A. About four thousand.

805 Q. Four thousand besides this equity?

A. Besides that real estate.

806 Q. Now, you have a surplus at this time, in your bank, of $2,500, do you not?

A. Yes, sir.

807 Q. And what was the source of that surplus, was that paid in or did it come from earnings?

A. From earnings.

Mr. Abbott: That is all.

[fol. 145] Cross-examination for intervenors.

By Mr. Campbell:

808 Q. Mr. Svoboda, you stated on redirect examination that you were joining with about 559 other banks in this action?

A. Yes, sir.

809 Q. What do you mean by joining with them, are you joining with them to finance the action?

Mr. Sidner: Object as repetition and leading, calling for conclusion of the witness.

The Court: Overruled.

Exception.

A. We did contribute to the expenses of this action.

810 Q. To the expense of this action. And you mean 559 banks have done that?

A. That is my understanding.

811 Q. And it is your understanding they are all plaintiffs with you although the action is really in your name?

Mr. Sidner: Object as incompetent, immaterial and irrelevant and calling for conclusion.

The Court: Overruled.

Exception.

A. Yes, sir.

812 Q. Now, Mr. Svoboda, do you know the condition of these 559 banks, of your own knowledge?

A. No, sir.

813 Q. You know the condition only of your own, is that correct, of your own knowledge?

A. Yes.

[fol. 146] 814 Q. Did you read the petition that was filed in this action with the Abie State Bank as plaintiff?

A. No, sir.

815 Q. Have you ever read it?

A. No, sir.

816 Q. Do you know what is in it?

A. I do not.

Witness excused.

Mr. F. J. Svoboda, called as a witness on behalf of the Defendants, being previously sworn, testified as follows:

Mr. Abbott: In order to enable the witness to go home we will call him for a few questions and expressly reserve the right to make such motion as we see fit at the conclusion of plaintiffs' case and ask to have this evidence considered the same as if it were offered when we arrive at our case in chief.

Direct examination.

By Mr. Abbott:

817 Q. Mr. Svoboda, is it your desire to leave Lincoln before the conclusion of the trial or before the defendant's testimony is entered upon?

A. I would like to leave this afternoon about four o'clock.

[fol. 147] 818 Q. This afternoon about four o'clock. Mr. Svoboda, when was your bank organized?

A. In 1904.

819 Q. During the first few years of its operation, say the first six years, up until 1910, what dividends were declared?

Mr. Sidner: Object as beyond the issues of this case.

The Court: Overruled.

Exception.

820 Q. You are familiar with the dividends declared during the first few years?

A. I am but I couldn't tell just what the dividends was every year.

821 Q. What year was it you became identified with it?

A. 1912.

822 Q. What had been its earnings up until that time, that is its net earnings?

Mr. Sidner: Object as incompetent, immaterial and irrelevant, no proper foundation laid.

The Court: He may answer.

Exception.

A. I couldn't say how much dividends was then because I haven't got the figures with me and I couldn't say just what the dividends was but I do know we had dividends every year except the first one.

823 Q. Every year except the first one. Now at the time you became identified with the bank, in 1912, what was its capital and surplus?

A. The capital was $10,000 that year. The surplus, I don't remember; it was increased to $15,000 in 1917 I [illegible] $4[illegible] believe.

824 Q. And how was that increase made up?

A. I believe from the surplus.

825 Q. From the earnings?

A. I think from the earnings and the surplus.

826 Q. Then, since 1912 the capital has been increased from $10,000 to $15,000 out of the earnings?

A. Yes, sir.

827 Q. Now this increase in capital, Mr. Svoboda, was the $5,000 out of earnings that you had accumulated after you went in the bank in 1912?

A. It was earnings from 1910 up to 1917.

828 Q. And do you know when the $2,500 was added from the profits to surplus?

A. Part of the time.

829 Q. State your best information in that regard.

A. I don't remember when we put in the first $500 but $1,000 was put in in 1920 into the surplus; $500 in 1921, I believe and $500 in 1926; the first $500 I don't remember just what year it was put in.

830 Q. I see. Now, when you went into the bank in 1912 do you remember how much undivided profits they had?

A. I can't say.

831 Q. Calling your attention to, for the purpose of refreshing your recollection, to a report which purports to be your report to the Department of Trade and Commerce under date of December 31, 1928 you may state what the dividends to stockholders have been since the organization [fol. 149] of your bank?

Mr. Sidner: Object as incompetent, irrelevant and immaterial, and too remote and not in issue in this case.

The Court: He may answer.

Exception.

Mr. Abbott: I withdraw the question.

832 Q. You may state what dividends you have declared and at what rate since you went into the bank in 1912?

Mr. Sidner: Object as incompetent, irrelevant and immaterial, too remote and not within the issues in this case.

The Court: Overruled.

Exception.

A. I couldn't say just what rate of dividend was paid in 1912.

833 Q. Give it as nearly as you can.

A. I know we declared dividends of 10% and sometimes as high as 15%, just what year it was I couldn't say.

834 Q. How many 15% dividends did you declare?

A. I couldn't say.

835 Q. 15% per annum?

A. Yes, sir.

836 Q. How many dividends at 10% per annum have you declared since you have been in there?

A. I couldn't say.

837 Q. How far is Abie from Lincoln, Mr. Svoboda?
A. Around fifty miles.

Mr. Abbott: In view of the fact that the witness is plain-
[fol. 150] tiff in the case we ask that we be permitted to recall him to the stand later and ask of the witness that he produce the books of the bank showing its earnings and deposits subsequent to the year 1910, the effective date of the Guaranty Fund Law.

Mr. Sidner: Object to that as immaterial.

Mr. Sidner: Pass the objection.

838 Q. Mr. Svoboda, have you continuously, since 1912 that you have been in the bank, had public moneys?
A. We had county deposit continuously.
839 Q. County deposit continuously. Since you have been in there have you, up to and including the year, up to July, 1928, given any bond for public deposits?
A. No, sir.
840 Q. Why, have you not given bond?

Mr. Sidner: Objected to as incompetent, immaterial and irrelevant and a question of law.

841 Q. And during the period since you have been in the bank, since 1912, have you continuously had upon your advertising the Guaranty Fund feature of your deposits?

Mr. Sidner: Objected to as calling for an opinion.

The Court: You may answer.

Exception.

A. No, sir, we did not.
842 Q. Have you stated to the depositors from time to time that their deposits were protected by the Guaranty Fund?
A. Oh, it was mentioned sometimes when there was talk about it, it was mentioned they were protected by the
[fol. 151] Guaranty Fund.
843 Q. And have you from time to time had those conversations with your depositors, that is, have you had those kind of conversations with your depositors, each one?
A. Sometimes we had, yes, sir.
844 Q. Sometimes, not always?
A. Yes, sir.

845 Q. And did you have on your Certificates of Deposit for a period the statement "Deposits in this bank protected by the Guaranty Fund of the State of Nebraska"?

A. We don't have it for sometime and I don't know if we have had it. I don't know that we have had it,

846 Q. You don't have it now and you don't remember if you ever had it or not?

A. I don't know.

847 Q. What part of your stationery do you have it on?

A. None.

848 Q. None, now. Do you remember when you had it on in the past?

A. I don't remember; we might of had it on the checks one time when we came in but I don't remember that we ever ordered it printed on the checks or stationery.

849 Q. Well, it was on there whether you ordered it on or not.

A. It might have been on when we came into the bank, it might have been, I wouldn't say.

850 Q. Did you have it on the windows of the bank?

A. No, sir.

Mr. Abbott: That is all.

[fol. 152] Mr. F. J. Svoboda, called as a witness on behalf of the Intervenors, having been previously sworn, testified as follows:

Direct examination.

By Mr. Hotz:

851 Q. What is the average rate of interest on money loaned in your community?

A. We charge 7%.

852 Q. Is there a good demand there for loans?

A. Yes.

853 Q. Your bank is in a fairly good, prosperous condition according to your view of it, isn't it?

Mr. Sidner: Object as calling for conclusion and not proper question.

The Court: He may answer.

Exception.

A. We didn't have much profit at the end of the year.

854 Q. You don't feel there is any danger of your bank being closed up?

Mr. Sidner: Object as not proper question.

The Court: Sustained.

Exception.

855 Q. Do you think you could loan out more money that you have on deposit for the purpose of loaning, at the present time, in your community?

A. I don't think so, I don't think so.

856 Q. You supply the full demand for the loans that are there in your community from your deposits and capi- [fol. 153] tal stock that is there for that purpose?

A. I don't know if we supply the full demand, I don't make all the loans they ask for sometimes.

Mr. Hotz: That is all.

Cross-examination.

By Mr. Sidner:

857 Q. Mr. Svoboda, have you told anybody in the last two years that you remember that your deposits were protected by the Guaranty Fund?

A. Oh, I don't know for sure if I had or not because those matters are discussed among the people sometimes.

858 Q. The dividends that you testified about, those larger dividends, were all paid prior to 1920?

A. Prior to 1921, I think.

859 Q. Have you any public money on hand now?

A. County deposits, county money.

860 Q. You give bond for that?

A. Yes, sir.

861 Q. When was bond demanded of you for that?

A. Oh, two or three weeks ago.

Mr. Sidner: That is all.

By Mr. Hotz:

862 Q. You dont' think there is any danger of your bank being closed up?

A. No.

Witness excused.

Recess.

[fol. 154] Mr. Clarence G. Bliss, recalled for further cross examination, testified as follows:

By Mr. Abbott:

863 Q. Mr. Bliss, can you tell us now how many banks there were whose stockholders contributed to stockholders' assessments to repair capital, as to the two million and some dollars you testified about this morning?

A. I can tell approximately, it is an estimate made up in the office.

864 Q. How many banks whose stockholders so contributed?

A. The estimate is two hundred forty two.

865 Q. Two hundred forty two is the number of banks. In addition to the amounts contributed to make up losses?

A. That is repairing capital. There might have been some paid in from surplus.

866 Q. Mr. Bliss, reference was made this morning on direct examination to some committee that you cooperated with in the making up of certain figures as to a number of banks; When was that?

A. That was in May, 1927.

867 Q. And who was on that committee?

A. Probably a dozen bankers that were selected.

868 Q. Can you name some of them?

A. I think Mr. McCloud, the original committee was about a dozen; ten or twelve and then it got down to three or four active ones. The active ones were Mr. McCloud, [fol. 155] Mr. Schantz and Mr. William Seelenfreund.

869 Q. For how long a period were they active, that is in connection with your office?

A. They made several visits to the office, a week or two between the visits.

870 Q. And on their visits did they make up compilations of their own from your reports.

Mr. Flansburg: Objected to as not cross examination.

The Court: Sustained.

Exception.

871 Q. In the preparation of this data with respect to which you testified, who prepared it?

A. It was prepared by the committee.

872 Q. And from what source?

A. From all of the bank examiners' reports, they were consolidated and that information given to this committee.

873 Q. And did this committee from those reports make up its classification?

A. Yes.

874 Q. And is that the classification and the data that you used in your testimony this morning?

Mr. Flansburg: Objected to as not proper cross examination.

The Court: He may answer.

Exception.

A. Yes, it is covered in that exhibit.

875 Q. Now, as to these items that you testified to this morning that thus originated, were those losses that had been ordered charged off or were some of those criticised [fol. 156] items with reference to which the bank hadn't conceded your position?

A. Those were losses set out in the examination by the examiners and of course quite frequently the banks don't agree with the examiners.

876 Q. And they had not yet been charged off with respect to the banks?

A. No.

877 Q. And what was the amount of those criticised items in the aggregate, as to the total at that time?

Mr. Flansburg: Object as not the best evidence.

The Court: He may answer.

Exception.

A. Approximately a million and a quarter or a million two hundred thousand, it is shown on the report.

878 Q. That is, on report Exhibit 4, heretofore identified?

A. Yes, sir.

879 Q. Now then, in the interim between May, 1927 and the present time you may state what has become of those criticised items and what has been done with respect to the banks that you testified this morning would have their capital impaired if those bad items had been charged off?

Mr. Flansburg: Objected to as calling for a conclusion.

The Court: He may answer.

Exception.

A. I do.

880 Q. You may state what has been done in the two years that have intervened since.

By Mr. Flansburg:

[fol. 157] 881 Q. Mr. Bliss, what are the charge offs you are speaking about, what amount?

A. $1,200,000 were set up.

882 Q. What banks do those notes belong to, can you name a single bank to which those notes belong?

A. I probably can't name all right at this minute. There was over half a million dollars that was raised to take out these notes.

By Mr. Abbott:

883 Q. You have testified to certain banks that at that time would have had their capital wholly impaired if the items criticised had been charged off. Now, what has been done with those particular banks in reference to that particular condition since May, 1927 and prior to this suit?

Mr. Flansburg: Object unless the knows the amount recommended to be charged off, unless he has made a further examination of these reports.

The Court: He may answer.

Exception.

884 Q. That is, the banks you refer to as the, I think forty-five in number, you may state the facts, if you know.

Mr. Flansburg: Object as no foundation laid.
The Court: Overruled.

Exception.

885 Q. You may state.

A. We closed since that time over one hundred banks which would take in this forty and twenty-five listed here; forty-one and twenty-three, that is sixty-four as mentioned [fol. 158] in this Exhibit 4. That would take care of sixty-four of them and in addition to that nearly forty more have been closed since that time and in addition to that, as to taking out losses, the report filed here this morning shows that we have raised from stockholders approximately or over half a milion dollars.

886 Q. For what purpose?

A. For taking out losses, so what stockholders raised plus the closing of a hundred banks, that condition has been taken care of since May, 1927.

887 Q. Now, as to one bunch of banks that were gone over at that time; was there losses of one to five thousand dollars in each?

A. Yes, sir.

888 Q. Now, referring to the banks mentioned by Mr. Flansburg, in his examination, other than those you have just referred to, was there a list of banks that the committee and you estimated would have losses from one to five thousand each, provided certain criticised items were charged out?

A. Yes, sir.

889 Q. How many of those banks were there, Mr. Bliss?

A. I don't exactly get it.

890 Q. Well, get at it in this way. Were the banks, other than you just testified to, banks that would have small losses of one to five thousand if the items were charged off?

Mr. Flansburg: Objected to as leading.
[fol. 159] The Court: He may answer.

Exception.

A. Yes many of the banks have losses of from one to five thousand.

891 Q. That is, in the event the criticised items were conceded by the bank and charged off?

A. Yes, sir.

892 Q. And in many instances the criticised paper was resisted by the bank?

Mr. Flansburg: Object as immaterial.

The Court: Overruled.

Exception.

A. In some instances, yes.

893 Q. And I will ask you this broad question. Have those conditions, as noted by you, and the committee at that time, since that time been entirely remedied?

Mr. Flansburg: Object as calling for a conclusion and not cross examination.

The Court: I presume you ought to get the facts to show that is past. Objection sustained.

Exception.

894 Q. Now, then, in the event that all of the criticised items set up by this committee had been charged off at that time, in May, 1927, how many banks would have lost their capital?

Mr. Flansburg: Objected to as not cross examination and not definite as to what banks are referred to.

The Court: He may answer if he can.

Exception.

A. After those losses were all charged off there wouldn't [fol. 160] be any impairment.

895 Q. You mean, after the losses were charged off?

A. If all the criticised paper was taken out and removed, after the criticised paper was all taken out there wouldn't be any impairment.

896 Q. Now, referring to your testimony this morning, Mr. Bliss, and the interrogatories propounded to you by Mr. Flansburg and the banks then referred to, how many of the banks were there that would have lost their entire capital when the criticised items the examiners found had been charged off?

Mr. Flansburg: Objected to as repetition.

The Court: He may answer.

Exception.

A. The losses were equal to or more than the capital and surplus in about sixty four of those banks.

897 Q. Now, then, as to how many other banks would there have been an impairment of capital in the event that the criticised items had been charged off?

A. There would probably have been a hundred more banks at that time with small losses up to quite large losses.

898 Q. Now, as to this one hundred banks and the sixty odd banks that you referred to, what disposition has been made of those conditions since May, 1927?

Mr. Flansburg: Objected to as repetition.

The Court: He may answer.

Exception.

A. The fact that we have closed one hundred banks, we will assume the sixty four banks with impaired capital are a part of this other one hundred banks that were [fol. 161] closed and turned over to the Commission and a part of the other banks have been taken care of by assessments on stockholders in those banks as reported on that list.

899 Q. And as to such banks as are not in operation and as to such other banks as Mr. Flansburg inquired about this morning, is there any capital impairment?

A. There might be a slight impairment. In the banks left it would be very slight. They might have losses in them and the losses would be absorbed by their surplus account or any undivided profits or earnings they might have on hand.

900 Q. Has that condition that he interrogated you with reference to been cleared up in the manner your testified to?

Mr. Flansburg: Objected to as repetition.

The Court: Sustained.

Exception.

901 Q. Did you testify that if the criticised items in the banks had been taken out in May, 1927, that three hundred fifty banks would have had their capital impaired?

Mr. Flansburg: Object as calling for conclusion, the record will show.

The Court: Sustained.

Exception.

902 Q. Well, what is the fact in that regard as of May, 1927?

Mr. Flansburg: Object as repetition.

The Court: He may answer.

Exception.

A. The facts are back in May, 1927, that committee report, in checking up all the banks in our Department, revealed eight hundred and twenty banks. They set out something like three hundred that had no losses in them [fol. 162] whatever. The balance of those banks had some losses or criticised paper in them, running from a small amount in the first tabulation on up to larger amounts of losses until they listed the sixty four banks at the end of the list, making eight hundred twenty banks in all.

903 Q. Now, then, the question: Now as to the banks other than the hundred sixty four you testified to being insolvent, was there any capital impairment in the remainder of the banks? In other words, were any losses in those banks taken care of by undivided profits?

A. There might have been some because some of the banks had undivided profits and surplus accounts in them.

904 Q. Do you know of any banks that would have had their capital and surplus impaired, other than the banks you testified to, the one hundred sixty four?

A. Do I know of any banks at that time? I didn't know of any at that time other than those covered by the committee's report.

905 Q. Mr. Bliss, I am distinguishing as between banks that were in your consideration at that time and you have testified as to one hundred sixty four banks that had their capital impaired, or would have had their capital impaired, either wholly or in part, if criticised items had been deducted and you have testified as to the disposition that has been made with those banks, either by receiver or by supplying impaired capital. Now, I am asking you as to the

other banks, that class of banks other than the ones you testified had this loss of one or five thousand, as to whether [fol. 163] there was capital and surplus to take care of them if those losses had been wiped out?

Mr. Flansburg: Object as repetition.

The Court: Let him answer.

Exception.

A. The balance of those banks. We have taken care of one hundred sixty four; that part you ask about is the balance of those banks.

906 Q. Yes.

A. The balance of those banks were taken care of in part or in all by that assessment we mentioned and together with whatever was charged to surplus and earnings that they already had on hand; that assessment plus any surplus they had on hand would enable them to take care of the losses and repair their capital.

907 Q. Now, if all the paper as criticised by the committee in May, 1927, had been charged off the actual capital of how many banks would have been impaired?

Mr. Flansburg: Object as repetition.

The Court: You may answer if you have anything further.

Exception.

A. That million two hundred thousand of criticised paper that was in that report referred to all those banks, less the approximately three hundred that we said did not have any criticised items in. Three hundred banks to begin with did not have any losses at all. Another group of banks had some loss. If I had the figures I could tell you.

908 Q. What we are trying to get at is the banks that [fol. 164] didn't have impaired——

A. The committee didn't take that into consideration, as to capital impairment, just figured on the losses in the banks, I think that report covers that.

909 Q. Then, aside from this list of one hundred sixty-four banks what was the amount of the loss in the other criticised banks, or the amount of the criticised paper in the other banks, that is, the average?

A. As I recall it, one hundred sixty-four banks had an eight hundred thousand dollar loss set up.

910 Q. I am not asking you as to the banks that you referred to as the one hundred sixty-four, I am not asking you as to those. I am inquiring as to what was the average loss in those banks who had other criticised items, the average loss of banks other than the one hundred sixty-four you testified to.

Mr. Flansburg: Objected to as repetition.
The Court: You may answer if you have anything further.

Exception.

A. We set out those losses, the committee did, in here from one to five thousand dollars of loss.
911 Q. That is, the committee set that up in a number of banks?
A. Yes, sir.
912 Q. Now, how many banks was that?

Mr. Flansburg: Object, this is not cross examination.
The Court: Overruled.

Exception.

913 Q. How many banks were there that set up that loss of one to five thousand?
[fol. 165] Mr. Flansburg: Objected to as not the best evidence.
Mr. Abbott: Withdraw the question for the time being.

914 Q. Mr. Bliss, when you testified this morning in answer to Mr. Flansburg's questions, to what circumstance, and to what information did you refer?
A. I was referring to this committee report, Exhibit 4.
915 Q. And when you were testifying in reply to his questions as to information that you had and the information you gave, what were you referring to?
A. I was basing my facts as to my memory of that committee report. That is the only time we ever undertook to check the condition of the banks in that way.

Witness excused temporarily.

Mr. VAN E. PETERSON, a witness previously sworn, recalled by the intervenors, and testified as follows:

Cross-examination.

By Mr. Hotz:

916 Q. Mr. Peterson, in the Exhibit 1 that was introduced [fol. 166] in evidence here yesterday there is an item of $39,000,000 in round figures that represent the total assets on that exhibit and off to the right hand side it states you expect to realize from those assets ten million dollars in round figures. Now, in that list of assets how much is cash?

A. $2,239,691.73.

Mr. Hotz: That is all.

Redirect examination.

By Mr. Sidner:

917 Q. Mr. Peterson, that cash belongs to receiverships and operating banks, does it not?

A. Yes, sir.

918 Q. And is that in the hands of the Guaranty Fund to be distributed for any other purpose?

A. No, sir.

By Mr. Hotz:

919 Q. Does it have any other or different classification than you have already shown, then? It is included rightly in there, is it not?

A. Yes, sir.

920 Q. With the rest?

A. Yes, sir.

921 Q. And in Exhibit 1 in the thirty-nine million odd dollars of assets you have listed that two millions is concluded?

A. Yes, sir.

922 Q. It belongs to the Guaranty Fund Commission?

A. It belongs to individual trusts, that is, this is the [fol. 167] aggregate of cash belonging to three hundred and some odd trusts.

923 Q. And for administration under the Guaranty Fund?

A. Yes, sir.

924 Q. And ultimately to be distributed in accordance with the findings of the Guaranty Fund Commission?

A. Not in accordance with the Guaranty Fund Commission but in accordance to the trusts, to the parties to whom it is to be distributed.

Mr. Hotz: That is all.

By Mr. Sidner:

925 Q. How much money is there in the hands of the Guaranty Fund Commission, obtained from assessments, for distribution under the Depositors' Guaranty Fund Act?

A. Not a cent.

Witness excused.

Whereupon an adjournment was taken to the following day, January 31, 1929, at ten o'clock, a. m.

[fol. 168] January 31, 1929, ten o'clock a. m., court convened pursuant to adjournment, the trial was resumed and the following proceedings were had, to wit:

STIPULATION RE OBJECTIONS

It is stipulated that an objection as to incompetency and immateriality shall be construed to cover all other objections that might be made except the objection, not proper cross examination.

Mr. CLARENCE G. BLISS, recalled for further cross examination, testified as follows:

By Mr. Abbott:

926 Q. Mr. Bliss, at the time that you referred to here yesterday, May, 1927, you had some contact with the committee of bankers where you got together some information from your department?

A. Yes.

927 Q. And what was the purpose of getting the information together, what was the occasion?

A. So that

928 Q. For whom?

A. It was for a bankers' committee called at the instance of the Governor to acquaint them with existing conditions.

929 Q. And with particular reference to what fund, if any?

A. The Guaranty Fund.

930 Q. To estimate what amount might become charged against the Guaranty Fund?

[fol. 169] A. Yes, and so that the bankers generally would know the situation.

931 Q. Now, then, in getting this report for the Governor did you have the cooperation of the bankers' committee?

A. Yes.

932 Q. Now, in the connection did you estimate the number of banks in which, from the information at your disposal claims would arise against the Guaranty Fund?

Mr. Gaines: Objected to as not cross-examination.

The Court: Sustained.

Exception.

933 Q. Mr. Bliss, reference was made by Mr. Dawson in some questions here yesterday as to there being three hundred fifty banks having a capital impairment in May, 1927. Did you in May or thereabouts, at the time referred to by him, estimate that any definite capital impairment existed in any banks other than the sixty-four banks that you testified to, that would become charged against the Guaranty Fund?

A. No.

934 Q. And now as to such banks as you estimated on the information in the spring of 1927 as probably having capital impairment, based on the reports of your examiners and your information as to items, assets, that should be charged off you may state whether or not all of those banks and such capital impairment had been taken care of by either taking over the banks or by some capital assessment [fol. 170] that is as to such banks as had their capital impaired?

A They have all had the attention of the Department and are practically cleaned up in some way and disposed of in some way.

Q That is what I was getting at. Now, referring to the matter of these, this condition of these particular banks and this capital impairment, do you know the cause and reason for that capital impairment? Answer that "Yes" or "No".

A Yes.

Q You may state to the court the reason for it.

A Principally from loans made during the deflation.

Q Made prior to the deflation?

A Prior to the deflation or during the deflation time.

Q I take it you mean shrinkage on the loans made during the deflation period?

A Yes.

Q Was that condition in any way attributable appreciably to any assessments paid to the Guaranty Fund?

Mr Flanders: I object as incompetent.

The Court: He may answer.

Exception.

A In answer, the assessments during that time was a very small matter compared to the losses.

Q Mr Bliss, you mean that any amount that the particular banks had paid to the Guaranty Fund theretofore by way of assessment had had no appreciable result upon the then condition that is those failed banks that had lost capital and surplus?

Mr Ely: A. I had more effect but I wouldn't say it was the outstanding effect at all.

Q You have testified as to the outstanding effect. Now answer this as to the Guaranty Fund assessments paid by those banks not any appreciable figure in their then condition as you found it?

A No.

Cross examination.

By Mr Campbell, for intervenors.

Q Mr Bliss, you have many times during these cross examinations referred to the report of the committee of bankers. Is that Exhibit 4 here in evidence?

A. Yes.

943 Q. That is what you have been referring to, Exhibit 4 in evidence?

A. Yes.

944 Q. And that Exhibit reflects the facts therein set out as you understand them to be?

A. Yes.

945 Q. Mr. Bliss, in your opinion, basing it upon your experience as the head of your Department and your familiarity with the banking conditions, would there have been a banking crisis develop, such as we are considering, if the matter of deflations had not occurred?

Mr. Flansburg: Objected to as incompetent and immaterial.

The Court: He may answer.

Exception.

[fol. 172] A. In my opinion it would not.

946 Q. Mr. Bliss, one other question: When you said the balance of the,—No, I believe that would be repetition.

Redirect examination.

By Mr. Gaines:

947 Q. When did this so-called deflation period end, or what were the years of deflation, rather?

A. Deflation, the idea of when stuff went up, no, deflation.

948 Q. You have spoken here of the deflation period?

A. I would make that since 1920.

949 Q. Including the present time?

A. Yes, covering the time clear down.

950 Q. The deflation period has been since 1920?

A. Yes.

951 Q. And is still going on?

A. Yes. There is some deflation today.

952 Q. Now, have I understood you to say that the previous assessments paid into the Guaranty Fund by the bankers of this state had no appreciable effect on the capitail impairment of the banks?

A. No outstanding effect.

953 Q. And were you speaking now of the conditions in 1927 when you made that statement?

A. No.

[fol. 173] Q. What period were you covering?

Mr. Abbott: Object as immaterial.

The Court: Overruled.

Exception.

A. The deflation period.

955 Q. That is the period from 1920 down to the present time?

A. Yes.

956 Q. And what was the amount of the assessments paid into the Guaranty Fund during that period from 1920 to 1928, as testified to by you, approximately?

A. We gave it yesterday.

957 Q. It was in excess of fourteen million dollars, wasn't it?

A. Yes, sir.

958 Q. It was in excess of fourteen million?

A. Yes, sir.

959 Q. Is the figure in the tabulation $14,600,000?

A. Something like that.

960 Q. What was the capital of the banks during that same period, approximately?

A. The capital stock itself was twenty-two million in 1918.

961 Q. And you give it as your opinion that the taking from these banks of upwards of fourteen million dollars had no very striking effect upon capital impairment?

Mr. Abbott: Objected to as argumentative and not including other items that entered into it.

The Court: Overruled.

Exception.

A. Why, it had some effect on the banks, it would have some effect.

[fol. 174] 962 Q. What effect did it have?

A. The effect of fourteen million dollars, it was a minor matter compared with the losses.

963 Q. What were the losses, if you know?

A. Well, there were 268 banks closed, going up into some thirty-five millions.

964 Q. I am not speaking of them, I am speaking of the existing banks, what effect did it have on them, the taking out of this large amount of money, as to capital impairment? Do you understand the question?

A. I don't believe I do.

965 Q. What effect, if any, in your opinion did the assessments paid to the Guaranty Fund of upwards of fourteen million dollars have upon the now existing banks, as to capital impairment?

A. All existing banks have charged it out of their earnings and have taken care of it from year to year. It has had some effect.

966 Q. How about the three hundred fifty banks that had no earnings in the year and a half?

Mr. Abbott: Objected to as cross examination.

The Court: He may answer.

Exception.

A. I didn't know there were three hundred fifty banks that has had losses this year.

967 Q. What do your records show, of your Department, how many?

A. I don't have it before me, I haven't checked it up lately.

968 Q. Have you checked it up at any time?

[fol. 175] A. I don't think I have.

969 Q. You mean to say you have never checked up your banks so you would know how many are not making money?

A. Oh, I have at different times. I——

Mr. Abbott: Object to this as not the best evidence.

The Court: Overruled.

Exception.

A. I don't think there is over twenty-five or thirty banks that are in the red for the year past, that is whose earnings is less,—I will change that; I don't want to say on that until I look it up, I don't know.

970 Q. After eliminating all proper losses, would you say there were as many as a hundred?

A. I don't know that I can give you that. I am not sure.

971 Q. Do you know the number that paid dividends the past year?

A. Yes.

972 Q. How many, don't cite the banks, just give the number.

A. The number paying in 1928. One third, not quite one-third.

973 Q. Of what?

A. Of the banks paid dividends.

974 Q. In 1927?

—. Just a fraction over one-third.

975 Q. In 1926?

A. I don't know in 1926.

976 Q. For the last two years only you have examined it?

A. Yes.

977 Q. You mean by your answer the other two-thirds did [fol. 176] not pay dividends, as shown by your reports?

A. Yes, I do.

978 Q. Calling your attention to Exhibit 4, is that the exhibit being a report of the bankers' committee?

A. Yes.

979 Q. You spoke about a conference, I understood, with the Governor of the State and Mr. Peterson relative to this situation before your report was made. When did that conference take place?

A. As I recall, it was in May, in the summer or early spring.

980 Q. Who was present at that conference?

A. Quite a number of state bankers.

981 Q. The conference between you and Adam McMullen and Mr. Van Peterson?

A. Yes.

982 Q. What did the Governor state as to what you were to do at that conference?

Mr. Abbott: Object as hearsay.

The Court: Sustained.

Exception.

983 Q. Who composed that bankers' committee?

A. Well, it was presumed to be a committee of Nebraska bankers.

984 Q. Do you remember any of them?

A. Yes.

985 Q. State some of the names.

A. I think Mr. Weil.

986 Q. Is he a national banker or a state banker?

[fol. 177] A. A national banker. The Committee was a larger committee and subdivided later into a smaller committee.

987 Q. Who composed the smaller committee?

A. Mr. Weil, Mr. Schantz and as I recall Mr. McLucas.

988 Q. And Mr. Reilley?

A. I don't recall Mr. Reilley, I don't know whether he was or not.

989 Q. Do you recall any others?

A. Mr. McCloud.

990 Q. Is he a national or a state banker?

A. Both.

991 Q. After this interview with the bankers and the Governor at his office what did you do toward obtaining information for the Governor?

Mr. Abbott: Object as immaterial.

The Court: He may answer.

Exception.

A. Our office submitted to the committee reports of the banks, confidential reports with no names of banks attached.

992 Q. Did your office do any work towards that investigation?

A. Yes, I helped the Committee.

993 Q. What individuals?

A. Those bankers.

994 Q. That you have named?

A. Yes, that Sub-Committee.

995 Q. Have you got your work sheets, prepared by your office with respect to that information?

[fol. 178] A. We may have.

996 Q. Will you produce it here Monday morning?

A. I will see if I can.

997 Q. Have you any of them here?

A. No.

998 Q. What bankers went through the files of your office and at what time, I mean as to this committee?

A. There did not any of them go through the files of the office. We submitted a report.

999 Q. What was submitted to them?

A. A memo from the files without any names on it or anything, just to give them the data they wanted.

1000 Q. What data are you referring to, is that the data contained in your work sheets?

A. Yes.

1001 Q. That is, there are not any names of banks?

A. No, sir.

1002 Q. Just the data from your work sheets?

A. Yes, sir.

1003 Q. So that you mean that report of the committee, you mean that was the data furnished from your office?

A. Yes, sir.

1004 Q. From your office or by your office?

A. Either way.

1005 Q. Which, state it. Did you furnish the data?

A. Yes, sir.

1006 Q. When this report, exhibit 4, was sent out, who prepared it?

A. It was prepared in the Guaranty Fund Commission office.

[fol. 179] 1007 Q. Was it submitted to you before it was sent out?

A. I don't recall.

1008 Q. Did you see it before it was sent out?

A. I don't think I did.

1009 Q. So that the latter part of that report, you never saw that prior to the time it was submitted to the banks?

A. I don't think I did.

1010 Q. You didn't know it was in there?

A. No.

1011 Q. Is that a correct statement?

A. Yes, sir.

1012 Q. The report then was—as a matter of fact you did not submit a report to the Governor covering the eight hundred and twenty banks under discussion?

A. The Commission office sent that out as a sales letter to sell certificates.

1013 Q. What do you mean by that?

A. To sell Guaranty Fund Certificates, to get the bankers to buy them.

1014 Q. That is, the purpose was to get the banks at the time to underwrite this loss?

A. Yes.

1015 Q. And this information following the statement that as of the same date Secretary Bliss of the Department of Trade and Commerce submits a report, what follows that wasn't your report or the result of your investigation but the report of the committee?

Mr. Abbott: Object as already answered.

[fol. 180] The Court: Overruled.

Exception.

A. Yes, that is the report of the committee.

1016 Q. Who made the divisions and the classifications, 1, 2, 3, and 4?

A. The Committee.

1017 Q. And class No. 5?

A. The Committee.

1018 Q. And Class 6?

A. The committee.

1019 Q. Who selected the banks to go into those classes?

A. I think the committee did.

1020 Q. And was that selection from the data furnished by your office?

A. Yes.

1021 Q. Did you agree with that report at that time?

A. I didn't comment on it in any way at that time. I thought it was all right.

1022 Q. It met your approval, then?

A. Yes.

1023 Q. Do you claim now that that report is accurate?

A. Pretty accurate.

1024 Q. (Reading from Exhibit) The 64 banks in Classes No-. 5 and 6, after deducting capital and surplus, show a net loss of approximately $1,118,000 to be absorbed by the Guaranty Fund. That statement you now say is approximately accurate?

A. That has come true because we have taken over and absorbed those banks.

[fol. 181] 1025 Q. And has the loss been approximately $1,118,000?

A. I don't know what the loss would be.

1026 Q. You know it is upwards, many times, much larger?

A. In that particular group of banks it probably turned out more than we estimated.

1027 Q. Do you know how many banks have been turned over to the Guaranty Fund Commission by your Department from Classes 1, 2, 3 and 4 since May, 1927?

A. I do not.

1028 Q. Can you get a statement from your records?

A. We have turned over right at one hundred and there are sixty four of them in classes 5 and 6, so the difference would be in those other classes.

1029 Q. These 820 cover approximately all the banks at that time?

A. Yes.

1030 Q. So that if the 41 and 23 were covered by classes 5 and 6, making 67, the other 33 banks that have been turned over to the commission must have come out of classes 3 and 4?

A. Yes, some of those other classes.

1031 Q. Was the statement contained in this report, as follows: "Classes No. 1, 2, 3 and 4 show no loss to the Guaranty Fund as the capital and surplus would take care of all losses.", was that statement a fair reflection from the data furnished by you at that time to this bankers' committee?

A. Yes, sir, on the basis——

1032 Q. Answer "Yes" or "No."

[fol. 182] A. On the basis the committee was undertaking to determine if there would be any loss to the Guaranty Fund from those banks.

1033 Q. Do you want the whole answer to stand?

A. Yes, I think so.

1034 Q. Did you agree with the statement at that time that classes 1, 2, 3 and 4 show no loss to the Guaranty Fund as the capital and surplus would take care of all losses?

A. Yes, I thought so.

1035 Q. And was that a fair reflection from the data given to the bankers committee at that time?

Mr. Abbott: Object as repetition.

The Court: Overruled.

Exception.

A. I would think so.

1036 Q. Do you remember the statement that one hundred banks had been turned over to the Guaranty Fund Commission? Was that during the year 1927 or during the two years?

A. Since the committee report.

1037 Q. Do you now state that the statement I have read as to classes 1, 2, 3 and 4 was a fair reflection in face of the fact that a large number of banks in this short time have gone into the hands of the Commission?

A. I think it was as good an estimate as the average committee would have made at that time. I don't think it is any reflection on that committee.

1038 Q. Now, Mr. Bliss, isn't it a fact that this report contained in Exhibit 4 was made by you or by your Department and given to Mr. Peterson to be published by his Department?

[fol. 183] A. He may have gotten the information by word of mouth, I didn't give it to him direct.

1039 Q. Didn't you give it to him direct?

A. He might have got it through me or some of the help in the office.

1040 Q. Wasn't the substance of that report as given in Exhibit 4 written out in your office at that time and given to Mr. Peterson either by you or Mr. Marshall?

A. I presume it was something along that line.

1041 Q. You knew that this report was to be sent out by Mr. Peterson to the banks of the state?

A. Yes.

1042 Q. For the purpose of persuading them to underwrite the loss of the Guaranty Fund?

A. Yes.

Recross-examination.

By Mr. Abbott:

1043 Q. Referring generally to the two-thirds of the banks that haven't paid dividends during 1927 and 1928 you may state why they haven't paid dividends?

A. Because they had losses to absorb.

1044 Q. And is that the same class of losses that had arisen through the deflation period?

A. Yes, sir.

1045 Q. Used their earnings to absorb those losses?

A. Yes, sir.

By Mr. Hotz:

1046 Q. You gave the percentage of banks that declared [fol. 184] and paid dividends to stockholders in 1927, and 1928. Could you in the same way state the percentage of banks that had earnings?

A. I could not.

1047 Q. Now, Mr. Bliss, have any of the state banks paid the assessment called for by you on December 5, 1928?

A. We have not drawn any draft on any bank for that. They may have credited it to our account in their bank.

1048 Q. Why haven't you drawn drafts to pay the assessment?

Mr. Gaines: Object as immaterial.

The Court: Overruled.

Exception.

A. I didn't want to draw on a few. Have been awaiting the outcome of this law suit. There is only a few in that class.

Mr. Hotz: That is all.

Redirect examination.

By Mr. Gaines:

1049 Q. Referring to your testimony as to your opinion as to the effect upon capital impairment, as to the payment of the banks to the Guaranty Fund, did you make the statement to Mr. Dan Stephens and Mr. Schantz in your office in September of this year, of last year, 1928, that if these special assessments were continued it would result in upwards of three hundred of the present banks petering out because of that assessment?

Mr. Abbott: Object as incompetent and immaterial. We challenge the court's attention that Mr. [illegible] [fol. 185] is their own witness and produced by them and this is cross examining their own witness and seeking to impeach his testimony while having him on the stand in their case in chief.

The Court: Overruled.

Exception.

A. I don't recall the. I recall meeting and talking with these people but I don't recall the exact [illegible] have had so many conversations I could [illegible] was. No doubt, we talked about the difficulties confronting these banks.

1050 Q. Did you make that statement or not? Do you that you made that statement?

A. I neither affirm or deny it, I don't recall.

1051 Q. If you did make it, was that your opinion at the time?

A. Yes.

1052 Q. Have conditions changed since September, 1929, so as to change your opinion of that matter?

A. If I have had any occasion to change my opinion I don't recall going into it definitely.

1053 Q. As to capital impairment?

A. I don't think conditions have changed much since September.

Recross-examination.

By Mr. Abbott:

1054 Q. As a matter of fact, can all these state banks pay the Guaranty Fund assessment without material dis- [fol. 186] advantage and impairment to capital?

A. The majority can pay the assessments, yes.

1055 Q. Without material inconvenience?

A. Yes.

1056 Q. And are there, have there been heretofore compensating advantages by being protected by the Guaranty Fund that overcame any disadvantages caused by paying the Guaranty Fund assessments?

Mr. Gaines: Object as incompetent and immaterial.

The Court: Overruled.

Exception.

A. There has been some.

1057 Q. And as to any bank in the State of Nebraska now in operation that may have a deficit or earnings the use of which that is your Department as to any apportionable degree due to the Guaranty Fund assessments or to those extraordinary losses that occurred during the delinquency period?

Mr. Gaines: Object as incompetent and immaterial.

The Court: I think it has been gone over a good deal. Objection sustained.

Exception.

Redirect examination.

By Mr. Gaines:

1058 Q. Give each year from 1920 the number of failures of banks, either passed into the hands of a receiver or [fol 187] turned over to the Guaranty Fund Commission at the request of your office.

By Mr. Sorenson:

1059 Q. Give the number of banks that have been closed by the Department of Trade and Commerce beginning with the year 1920.

By Mr. Gaines:

1060 Q. Give us the number that have been closed, first, year by year.

A. I don't think we have that year by year. I have it but not each year at a time.

1061 Q. Make a compilation of them.

A. Just as to the number each year?

1062 Q. As to the number each year.

Witness excused.

Mr. Gaines: It is submitted that Exhibit 11, being the proceedings of the Senate, Senate Journal for the Forty-Fifth Session contains a correct copy of the inaugural address of Honorable Arthur J. Weaver, Governor of the State of Nebraska at this time and party defendant in this case. We offer from page 98 of the Exhibit, commencing at the top of the page, the part marked by the reporter, being the top paragraph, the part between the crosses [fol. 188] marked by the reporter.

Mr. Abbott: Defendants object to introducing this as incompetent, immaterial and irrelevant, no proper foundation laid and not proper to select one paragraph from a long inaugural message and the only paragraph from that part of the message dealing with this subject.

Mr. Campbell: Intervenors object to this as not being binding upon them for the reason that the Governor was not their representative and that he was in no position, has been at no time in position to bind them by any statement for the reason that they are the real parties in interest here and the Governor is merely a nominal party by virtue of his office and second for the reason that his statement is an opinion and conclusion and manifestly founded on hearsay and without evidential value, and third because it is an excerpt of a statement upon a general subject and is without full or fair meaning except in connection with other statements connected with it upon the same subject in the same address, and fourth, because the Governor is available as a witness within the jurisdiction of the court.

The Court: I think I will receive it. I have some question but as he is a party I will admit it as coming from a party.

Exception.

Exhibit 11 received in evidence, read to the court by [fol. 189] Mr. Flansburg, and is attached to this Bill of Exceptions and made a part hereof, appearing at page 197 hereof.

It now being twelve o'clock, noon, and adjournment was taken until one thirty o'clock p. m. of the same day, January 31, 1929.

One thirty o'clock p. m., January 31, 1929, Court convened pursuant to adjournment and the following proceedings were done and had, to wit:

Mr. Gaines: Plaintiffs offer in evidence from Exhibit 11 the portion shown on page 99 below the cross made by the reporter and to the cross made on page 100.

Mr. Abbott: Defendants object to introducing this as incompetent, immaterial and irrelevant, no proper foundation laid and not proper to select one paragraph from a long inaugural message and the only paragraph from that part of the message dealing with this subject.

Mr. Campbell: Intervenors object to this as not being binding upon them for the reason that the Governor was not their representative and that he was in no position, has been at no time in position to bind them by any statement for the reason that they are the real parties in interest here and the Governor is merely a nominal party by virtue of his office and second for the reason that his state-
[fol. 190] ment is an opinion and hearsay and without evidential value, and third because it is an excerpt of a statement upon a general subject and is without full or fair meaning except in connection with other statements connected with it upon the same subject in the same address, and fourth, because the Governor is available as a witness within the jurisdiction of the court.

The Court: I will withhold my ruling for the present.

The Court: Objection overruled.

Exception.

Mr. Gaines: Plaintiffs rest at this time and on Monday will offer evidence showing that Exhibit 4 was prepared jointly by Mr. Peterson and Mr. Bliss and that the same is information he gave the bankers and we shall offer Mr. Schantz and Mr. Stephens as to what Mr. Bliss told them when they called upon him.

Mr. Abbott: Plaintiffs having rested, subject to the later introduction of the particular evidence referred to and the defendants and Intervenor Stebbins having been requested to proceed with their case the defendants and Intervenor Wm. M. Stebbins, as Treasurer of the State of Nebraska, jointly and severally move the Court for a judgment in

their favor, that plaintiff has no cause of action and that the banks listed on Exhibit "A" attached to their petition have no cause of action and that this suit be dismissed for [fols. 191-195] the reason that the petition herein did not state a cause of action and for the further reason that on the evidence as adduced neither the plaintiff nor any banks listed on Exhibit "A" have established a cause of action against either the defendant or said intervenor.

The Court: Motion held in abeyance.

Exception.

[fol. 196] Mr. Gaines: Objections contained in depositions are not insisted upon by Plaintiffs unless especially urged.

Mr. Sorenson: Objections waived by Defendants. Defendants and Wm. N. Stebbins, as Intervenor, offer in evidence the deposition of Leo R. Wilson as read and Exhibits two to twenty-eight inclusive as identified by said Leo R. Wilson in said deposition.

Mr. Gaines: Plaintiffs object to offer of deposition as not being a proper method of proof. Object to the offer of Exhibit 2 to 28 for the reason they are immaterial.

The Court: The objection to the offer of the deposition is good but I am positive that Exhibits 2 to 28 have already been offered and received. Objection overruled because already admitted.

Exception.

Whereupon all exhibits read to the Court by Mr. Sorenson and leave given by Mr. Gaines for the supplying of Exhibit 2 left out by the stenographer in making the disposition.

Recess.

[fol. 197] EXHIBIT No. 11

Senate Journal, Forty-fifth Session, Third Day

* * * * * * *

[fol. 197a] Lieutenant Governor Williams introduced Governor Arthur J. Weaver who addressed the Joint Assembly as follows:

Governor's Message to the 45th Session of the Nebraska State Legislature

SENATORS AND REPRESENTATIVES:

* * * * * * *

[fol. 197b] When the facts relating to the public business present a grave problem requiring solution, such facts should be stated fully and frankly. I therefore respectfully call your attention to the fact that the Guarantee Fund, as nearly as I can ascertain, has present and prospective liabilities above present assets of from sixteen to twenty million dollars; that the present income from assessments on banks is approximately one and one-half million dollars; that most of these liabilities either are, or soon will be, reduced to judgment, and the judgments will draw interest at seven per cent, which on a basis of twenty million dollars makes an annual interest charge of one-million four-hundred-thousand dollars; that with any appreciable reduction in this income either from further bank failures, nationalization of some of the present state banks, or seasonable declines in deposits, the income will meet the interest charge only, and no funds will be available to pay the principal; that under such a situation the Guarantee Fund cannot afford protection for present depositors against any future losses.

* * * * * * *

[fol. 197c] It logically follows therefore that we should draw a clear line of division between our program for liquidating past obligations and our program for the future. Justice to the splendid state banking institutions which have helped build Nebraska, and which must continue as indispensable factors in the state's growth and progress, demands that they must not be called upon for all the funds sufficient to simultaneously liquidate past obligations and build a fund for present and future needs. This position is sustained by the fact that the state banks of Nebraska have already paid, in their efforts for the protection of their depositors, an amount almost equal to the capital of all

[fols. 197d-203] state banks, and that a continuation of such a load threatens the whole system.

* * * * * * *

[fol. 204] EXHIBIT No. 13

LEO R. WILSON, of lawful age, being by me first duly examined, cautioned and solemnly sworn, as hereinafter certified, deposeth and sayeth as follows:

Direct examination.

By Mr. Abbott:

1063 Q. State your full name please.
A. Leo R. Wilson.
1064 Q. Where do you reside?
A. Omaha, Nebraska.
1065 Q. What is your occupation?
A. Advertising Director for the Omaha Bee-News.
1066 Q. How long have you occupied that position?
A. I was advertising Director for the Omaha Bee for four years and then it changed to the Omaha Bee-News.
[fol. 205] 1067 Q. In June, July, August and September 1926 what was your occupation?
A. Advertising Director of the Bee, the Omaha Bee.
1068 Q. What is the Omaha Bee?

Mr. Gaines: It is a newspaper of general circulation.

1069 Q. The Omaha Bee through the year 1926, was a newspaper published in Omaha and had a general circulation throughout the state of Nebraska. Is that correct?
A. Yes sir.
1070 Q. Mr. Wilson, in the months of June, July, August and September 1926, did the Omaha Bee under your direction and supervision, do any bank advertising?
A. Yes sir.
1071 Q. Do you have present with you in court the files of the Omaha Bee for those months?
A. Yes sir.
1072 Q. Through those months did you run a series of page advertisements in that paper?

A. We ran a series of advertising, but not all full pages.

1073 Q. How many of them were there?

A. Twenty six.

1074 Q. You may turn to your files and give the list of advertisements that you ran at that time?

(Witness turns to the issue of June 27, 1926, July 1, 1926, July 4, 1926, July 7, 1926, July 11, 1926, July 14, 1926, July 18, 1926, July 21, 1926, July 25, 1926, July 28, 1926.)

[fol. 206] Mr. Gaines: It is admitted that each of the Exhibits was published in the Omaha Bee as of the date shown on the Exihibit.

Mr. Abbott: It is stipulated that the series of advertisements were run in the Omaha Bee and that defendants' Exhibits Nos. 2 to 27, inclusive, are exact copies thereof, and that said Exhibits may be introduced in evidence in lieu of the original with the same force and effect.

Mr. Gaines: Subject to the objection of immateriality, not objecting to being copies.

Mr. Abbott: The foundational questions are waived.

Mr. Gaines: Yes.

1075 Q. Were those advertisements published in all issues of the Omaha Bee as of that date, Mr. Wilson?

A. I couldn't say as to that. Some times we start in the evening paper and in the next morning. That would change the date and make it the following morning.

1076 Q. Any way, each advertisement reached all of the readers of the Omaha Bee?

A. Yes sir.

1077 Q. During the period stated?

A. Yes sir.

1078 Q. Who arranged for the Omaha Bee Mr. Wilson, if you know, for the publication of these advertisements. Who acted for the Bee?

A. I did.

1079 Q. Who procured and paid for the publications of [fol. 207] these advertisements, if you know?

A. The banks listed on the last advertisement.

1080 Q. The banks whose names appear on the advertisement marked defendants' Exhibit No. 27?

A. Yes sir. There was one other bank that did not want their name included. I don't remember which one it was.

1081 Q. Did you at that time have a contract with each of these banks for the publication?

A. Yes sir.

1082 Q. The several banks listed on defendant's Exhibit No. 27 you say paid for the advertising?

A. They all paid.

1083 Q. They paid their pro-rata on some basis established by you?

A. Yes sir.

1084 Q. Do you have with you Mr. Wilson a statement of the circulation of the Omaha Bee on the date of these publications and the distribution of that circulation?

A. I have a statement with me. That is the closest we have.

1085 Q. You may produce that, if you will?

A. Yes sir.

(Witness produces statement.)

1086 Q. You may now, with the consent of counsel, read into the record from this paper, being the Auditor's report, the distribution of the circulation as of the date of the publication of those advertisements.

A. The circulation of the Omaha Bee for the year ending December 31, 1925, is, city daily, 29,940; suburban terri- [fol. 208] tory, forty mile radius from Omaha, daily circulation 8,383; total circulation daily outside of this territory covering Nebraska, Western Iowa, Kansas, South Dakota, Colorado and a few scattering states, 33,633; miscellaneous sales 1,417, making a total daily paid circulation of 73,373.

1087 Q. Can you state approximately the number of the 33,363 circulation, circulated in the state of Nebraska, in percentage?

A. About two-thirds.

1088 Q. You are taking the 1925 circulation. How did that compare with the circulation in 1926 as to distribution and numbers?

A. About the same, approximately.

1089 Q. As advertising director of the Omaha Bee you had become familiar with the number and distribution of

the circulation approximately in the state of Nebraska of the Omaha Bee?

Mr. Gaines: We are not objecting to that.

1090 Q. You may give the circulation also of the Sunday paper of the Omaha Bee during that period.

A. The total city circulation on Sunday was 25,940; suburban territory, Sunday, being a forty miles radius of Omaha 9,578; total country Sunday circulation, being a circulation outside of this forty mile radius, covering Nebraska, Western Iowa, Kansas, South Dakota, Colorado etc., 38,318; miscellaneous sales 1,330; total Sunday circulation 75,166.

[fol. 209] 1091 Q. What would you say Mr. Wilson as to the proportion of those Sunday papers circulated in the state of Nebraska?

A. About two-thirds.

1092 Q. As to the week day paper, which you have heretofore referred to, I challenge your attention to one of those items, 38,323. What would you say as to the proportion of the circulation within the state of Nebraska?

A. It is about two-thirds all the way through as a total. Not as to the city only.

Mr. Abbott: The defendants now offer in evidence defendants' Exhibit No. 28 identified by the witness, showing the circulation of the Omaha Bee during the year 1925, which was substantially the same in 1926, and showing the distribution thereof.

Mr. Gaines: Plaintiff objects to the Exhibit as being immaterial, but the foundation is waived.

Mr. Gaines: This objection is urged by the plaintiffs.

Overruled. Exception.

1093 Q. Did you furnish to any of these banks any copy of this advertisement in any form at that time?

A. Yes sir.

1094 Q. You may state the facts with reference thereto.

A. We mailed each bank each week two copies of the advertisement on calendar paper identical with the copies that have been identified as Exhibits.

1095 Q. That is, each of the banks listed in defendants' Exhibit No. 27?

[fol. 210] A. Yes sir. They are the only ones that would receive copies.

Mr. Abbott: The defendants now offer in evidence defendants' Exhibits Nos. 2 to 27, inclusive, and each and every one of said Exhibits, having been identified as copies of the advertisements which were run in the Omaha Bee, with the understanding that counsel for plaintiff waive further foundation.

Mr. Gaines: Plaintiff objects to the Exhibits as being immaterial and incompetent—the incompetency, however, not going to the foundation.

Mr. Gaines: This objection is urged by the plaintiffs.

Overruled. Exception.

Cross-examination.

By Mr. Gaines:

1096 Q. Who prepared the copy Mr. Wilson?

A. Mr. Ballard Dunn and myself.

1097 Q. Who was Ballard Dunn?

A. He was then Editor in Chief of the Omaha Bee.

1098 Q. To whom was it submitted before publication?

A. It was submitted to Mr. Van E. Peterson, Secretary of the Guaranty Fund Commission and members of the commission at that time.

1099 Q. Was it submitted also to Mr. Griggs?

A. Also Kirk Griggs, Secretary of the Department of Trade and Commerce.

[fol. 211] 1100 Q. Before it was published?

A. Yes sir. But members of the Guaranty Fund Commission didn't always see all advertisements, but they were always submitted to Mr. Peterson.

1101 Q. Before publication?

A. Yes sir.

1102 Q. Was that submitted to them before the banks were solicited to pay for it?

A. The idea was submitted to them.

1103 Q. The idea was submitted to the Department of Trade and Commerce before?

A. Yes sir.

1104 Q. And the banks were told it received their approval?

A. Yes sir.

Redirect examination.

By Mr. Abbott:

1105 Q. That is, you had the idea to carry this forward for the banks and they entered into contracts with you—written contracts?

A. Yes sir.

1106 Q. For its publication?

A. Yes sir.

1107 Q. I take it you submitted it to the Guaranty Fund Commission to see if there would be any objection to it?

A. To see if the advertisements were truthful and correct.

1108 Q. Did you prepare the advertisements as they ran or did you prepare a series before any of them were run?

A. They were prepared as we were running them. We [fol. 212] would be a couple of weeks ahead of the time.

1109 Q. Who furnished you the information from which you prepared the advertisements?

A. The members of the Guaranty Fund Commission and Kirk Griggs.

1110 Q. That is the data; but who else did you co-operate with in preparing the advertisements?

A. We talked to numerous bankers but I don't believe I can tell you any particular one.

1111 Q. Did you talk to Mr. Dan Stephens a number of times?

A. Yes sir, several times. I wouldn't say a number.

1112 Q. That is Mr. Dan Stephens of Fremont?

A. Yes sir.

1113 Q. And Mr. Schantz?

A. Yes sir.

Recross-examination.

Mr. Sorenson: Objections waived by defendants.

By Mr. Gaines:

1114 Q. Did you have any conversation with Mr. Schantz?
A. Yes sir.
1115 Q. He was not very much in sympathy with it was he?

Mr. Abbott: That is objected to as not proper cross-examination.

1116 Q. He did not give it a great deal of support?
A. I didn't think Mr. Schantz was as much interested in it as some of the other members.
1117 Q. Were those talks with Mr. Stephens before or after the publication?
[fol. 213] A. I had one talk with him before the publication, and several after, while they were being published.
1118 Q. Is that the same with Mr. Schantz? Did you have any talk with him before the publication?
A. I had one talk with him before the publication.
1119 Q. Before you obtained his subscription?
A. His signature, yes sir.

Redirect examination.

By Mr. Abbott:

1120 Q. Mr. Schantz's bank is one listed in defendants' Exhibit No. 27, the State bank of Omaha, Nebraska?
A. Yes sir.
1121 Q. And he paid you his proportion of the expense for the circulation, did he?
A. He paid proportionately to the amount of his deposits?
1122 Q. The cost was based on the percentage of deposits?
A. Yes sir.

Mr. Abbott: That is all.
Mr. Gaines: That is all.

Witness excused.

[fol. 214] ALBERT L. SCHANTZ, of lawful age, being by me first duly examined, cautioned and solemnly sworn, as hereinafter certified, deposeth and sayeth as follows:

Direct examination.

By Mr. Abbott:

1123 Q. State your full name please?
A. Albert L. Schantz.
1124 Q. Where do you reside?
A. Omaha, Nebraska.
1125 Q. How long have you been a resident of Omaha?
A. Since 1906.
1126 Q. What relation do you sustain to the State Bank of Omaha?
A. President.
1127 Q. How long have you been president?
A. Since its organization, 1912.
1128 Q. The State bank of Omaha is organized under the laws of the state of Nebraska?
A. Yes sir.
1129 Q. Is that the bank referred to in Exhibit "A" attached to the petition in this suit as the State Bank of Omaha?
A. It is.
1130 Q. State the names and occupations of the present board of directors, and as far as you can recall, how long they have been on the board, approximately.

Mr. Gaines: Objected to as immaterial.

Overruled. Exception.

[fol. 215] A. You want me to start with my name?
1131 Q. Yes.
A. Myself, Oscar Keeline, Frank Gaines——
1132 Q. (Interrupting.) Oscar Keelin, is he a capitalist or what does he do?
A. A retired capitalist.
1133 Q. State the length of time he has been on the board.
A. About fifteen years.
1134 Q. Then the next one?
A. Frank H. Gaines.

1135 Q. How long has he been on the board?

A. About eight years.

1136 Q. The next one?

A. D. C. Eldredge. He has been on the board about seven years. Agnes K. Schantz, about two years. That is the entire board.

1137 Q. Have you been active as president and acted as an executor officer of that corporation since its organization?

A. Yes sir.

1138 Q. What was the original capital and surplus of the bank?

A. $300,000.00 capital, and $37,500.00 surplus cash paid in.

1139 Q. What is the present capital and surplus?

A. $300,000.00 capital, and $200,000.00 surplus.

1140 Q. Aside from the original surplus of $37,500.00, from what source has the remainder of the surplus been obtained Mr. Schantz?

[fol. 216] A. Cash paid in surplus $37,500.00 originally. In 1926 received from the sale of the lease to the Orpheum Theatre $50,000.00, making a net total received from earnings of the bank in our surplus account of $112,500.00 covering a period from 1912 to December 31, 1928.

1141 Q. You may state the amount passed to surplus from earnings in each year, as the surplus has been increased aside from the two items referred to?

A. In 1913, the surplus account showed $35,000.00. In 1916, $25,000.00 was added. In 1919, $15,000.00 was added. In 1920, $25,000.00 was added. In 1924, $30,000.00 was added. In 1925, $20,000.00 was added. In 1926, $50,000.00 was added.

1142 Q. Then, of the present surplus of $200,000.00, $112,500.00 has been obtained from earnings and $50,000.00 from the sale of the Orpheum lease?

A. Yes, sir, and $37,500.00 paid in cash at the time of the organization of the bank.

1143 Q. You may state the dividends paid since the organization, giving first the aggregate amount, and then the years and the amount in the particular year.

A. The total amount of dividends paid from 1918 to 1928 inclusive, $294,000.00. In 1918, the amount paid was

$18,000.00 No prior dividends to that date. In 1919, $18,-
[fol. 217] 000.00. In 1920, $24,000.00. In 1921, $24,000.00. In 1922, $30,000.00. In 1923, $30,000.00. In 1924, $30,000.00. In 1925, $30,000.00. In 1926, $30,000.00. In 1927, $30,000.00. In 1928, $30,000.00.

1144 Q. Your statement of September 20, 1928, to the Department showed undivided profits of $32,962.37, reserve $48,876.88. What disposition has been made of that?

A. The reserve of forty-eight thousand would be a reserve for taxes, a reserve for interest, a reserve for dividends. Undivided profits would have been paid out of any expenses, charge offs, bad notes or judgments and guaranty fund assessment.

1145 Q. In addition to the earnings to which reference has been made do you have some undivided profits?

A. We have no other earnings except as shown in our statement.

1146 Q. Calling your attention to defendants' Exhibit No. 1, what is that Mr. Schantz?

A. That is a published statement.

1147 Q. Is that a copy of your statement as of December 31, 1928?

A. Yes sir.

1148 Q. That is correct is it?

[fol. 218] A. Yes, sir.

1149 Q. May this Exhibit go in evidence in lieu of the original and be considered in evidence?

A. Yes sir.

Mr. Abbott: The defendants now offer defendants' Exhibit No. 1 in evidence and ask that the same be attached to these depositions and made a part thereof.

1150 Q. Your prior statement is what date prior to the published statement?

A. About September, late September, 1928.

1151 Q. Between these dates would there be some diminution in the amount of deposits?

A. Yes sir.

1152 Q. What occasions that?

A. We get fluctuations in deposits at different times.

1153 Q. Is that a seasonable fluctuation?

A. I would not say seasonable, because banking conditions are a little unusual and Lincoln giving it a good deal of publicity, which might account for some of it. I don't know.

1154 Q. This suit—the publicity of that?

A. Not the suit. The information that has been given out in Lincoln independent of this suit.

1155 Q. I wish you would kindly have prepared and produce, Mr. Schantz, the amount of public deposits, public funds, that you have had on deposit the last five years of [fol. 219] state, county and other sub-divisions.

Mr. Gaines: We object to that for the reason we do not think it should be made public, and for the further reason you have that information. You can state the amount if you want to but we do not think the names of the deposits should be given.

Mr. Abbott: The question does not contemplate the name of the depositor. It contemplates the amount of each and the character of the public deposit.

Mr. Gaines: You have that information.

Mr. Abbott: I- view of the objection desiring to reserve the privacy of the bank as far as possible, I will ask you to give a statement of the aggregate of the public funds on deposit in your bank for each of the last ten years by years.

Mr. Gaines: We will produce that at the trial.

Mr. Abbott: It is agreed then between counsel that such a statement may be produced and attached later to these depositions.

Mr. Gaines: That is all right. I may state here that Mr. Schantz will be present at the trial as a witness. We will furnish that information.

The Witness: We will furnish it as far back as we have it from our records.

1156 Q. Mr. Schantz, during the last fifteen years have [fol. 220] you given any depositor a bond for any public moneys?

A. No, sir. Not until January 1st, 1928. At that time the county treasurer and city treasurer are secured by a surety bond for their deposits.

1157 Q. Aside from those two instances you haven't given any bond?

A. Not until January, 1928. The state treasurer is now demanding bond and we are putting up a bond for that deposit.

1158 Q. What is the surety company's rate per bond?

A. I don't know. The county treasurer pays for his own bond.

1159 Q. During the last fifteen years what is the character of public deposits that you have had? Just state that generally?

A. State, city, county money.

1160 Q. Some school districts?

A. No sir.

1161 Q. Any outlying school districts?

A. No sir.

1162 Q. Or precinct?

A. Nothing outside of state, county and city, and not at all times county and city money.

1163 Q. Mr. Schantz, you have been present here and heard Mr. Wilson, advertising manager of the Omaha Bee-News identify copies of advertisements which were run in the Omaha Bee in June, July, August and September, 1926?

[fol. 221] A. Yes sir.

1164 Q. Do you recall the fact of the running of those advertisements?

A. Yes sir.

1165 Q. Did you participate therein and pay your proportion of the expense?

A. I wasn't very much in sympathy with the idea but I did contribute.

1166 Q. You are a subscriber of the Omaha Bee I take it?

A. No sir.

1167 Q. Any way, you knew of the fact of those advertisements being published through those months and your bank contributed to it?

A. They sold the advertisement plan to us because we wished to support all of the other banks that wanted to go in, but we were not in sympathy with the plan.

1168 Q. Now, what other advertising have you done, with particular reference to the guaranty fund law Mr. Schantz that you recall?

A. Our bank does not believe in advertising or spending money for advertising, except for our statement as requested by law. Our bank has not been built up on advertising.

1169 Q. I will ask Mr. Schantz that you you confine your answer to answering the question. Have you done any newspaper advertising through those years?

A. No sir, except the printing of our public statement as required by law.

1170 Q. You have published and circulated some pam- [fol. 222] phlets with reference to the guarantee law with your name on the reverse side?

A. We circulated a few pamphlets that we published by Dan Stephens and on the back of that pamphlet we had our statement.

1171 Q. My question contemplated how many different ones you published?

A. We didn't publish that. Dan Stephens published it.

1172 Q. Calling your attention to defendants' Exhibit No. 29, entitled on the first page "Nebraska Guarantee Fund, Protecting deposits in State Banks. Compliments of the State Bank of Omaha, corner 16th and Harney streets, Omaha Nebraska, the largest state bank in Nebraska". You received a supply of those from the Hammond Printing Company of Fremont, Nebraska?

A. Yes sir.

1173 Q. How many did you receive?

A. As I recall it two thousand.

1174 Q. And distributed them?

A. Laid them on the counters and let them pick them up.

1175 Q. When was that Mr. Schantz?

A. About December 1926.

1176 Q. About December 1926. You say you laid them on the counters. You mean the customers' counters in the bank?

A. The customers' counters in the lobby.

1177 Q. That the customers might have access to them and they took such as they wanted them?

A. For the convenience of the public.

[fol. 223] 1178 Q. Did you mail some of them with their monthly statements?

A. No sir.

1179 Q. They were distributed, you say, from the counters there?

A. Yes sir.

1180 Q. Is this defendants' Exhibit No. 29 one of those?

A. Yes sir.

1181 Q. One of the publications laid on the counters?

A. Yes sir.

Mr. Abbott: The defendants now offer in evidence defendants' Exhibit No. 29.

Mr. Gaines: That is objected to as immaterial.

Mr. Gaines: Offer of Exhibit 29 and the last question is objected to as immaterial.

Overruled. Exception.

1182 Q. Calling your attention to defendants' Exhibit No. 30, a pamphlet entitled "The Bank Guaranty Law challenged, and a red hot answer by a Nebraska Banker. Compliments of the State Bank of Omaha, A. L. Schantz, President, Omaha, Nebraska, the largest State Bank in Nebraska". You have seen that pamphlet?

A. Yes sir.

1183 Q. Was that one of the same pamphlets your bank received from the printing company?

A. Yes sir.

Q. About how many of those did your bank receive and when was it?

A. I cannot tell you, but I think about March 1925.

[fol. 224] 1185 Q. How many of them did your bank receive?

A. Two thousand.

1186 Q. What did you do with them?

A. Laid them on the desks in the lobby.

1187 Q. They were handled in the same manner as defendants' Exhibit No. 29?

A. Yes sir.

1188 Q. This defendants' Exhibit No. 30 is one of that two thousand?

A. Yes sir.

Mr. Abbott: The defendants now offer in evidence defendants' Exhibit No. 30.

Mr. Gaines: That is objected to as immaterial.

Mr. Gaines: The Exhibit 30 and the last question are objected to as immaterial.

Overruled. Exception.

Mr. Abbott: It having been agreed heretofore that the defendants might produce certain witnesses who were operating job printing establishments in Omaha to have identified and introduced in evidence certificate of deposit forms and other bank forms printed for the various banks, and counsel for the defendants having requested the Notary to issue subpœnas for the witnesses, it is now stipulated that the defendants may on the trial produce such printed forms with notations thereon by the printer as to the date of [fol. 225] printing of the same and they may be introduced without further identification or foundation, with the same force and effect as if said witnesses had identified same.

It is further stipulated and agreed that defendants' Exhibit No. 31 is printed matter of the State Bank of Omaha, being the certificate of deposit form, and that defendants' Exhibit No. 32 is the form issued by the State Bank of Omaha to depositors of funds therein on certificates of deposit and that said form is identical with those that have been in use since the organization of said bank. That defendants' Exhibits Nos. 31 and 32 have been used by the State Bank of Omaha since its organization, and having been so in use went out and were delivered to all depositors depositing moneys on certificates.

It is further agreed that defendants' Exhibit No. 33 is a true copy of the financial statement of the State Bank of Omaha as of September 20, 1928.

Mr. Abbott: Defendants now offer in evidence defendants' Exhibits Nos. 31, 32 and 33.

Mr. Gaines: Plaintiff objects to the offer as immaterial, [fol. 226] the objection not going to the foundation.

Mr. Abbott: The defendants now ask that all of said Exhibits and each of them be attached to these depositions and made a part thereof.

Mr. Gaines: No objection to that.

1189 Q. Mr. Schantz, what advertising with reference to the guarantee fund and deposits being protected by a guarantee fund bank have you had on the interior or exterior of your bank, if you have had such advertising?

Stipulation

It is agreed that the wording on the doors of the State Bank of Omaha at 16th and Harney streets, and the wording on the inside of the bank may be copied by the Notary and inserted and attached hereto as the answer of the witness to the question.

The sign on the door of the Harney street entrance is as follows:

"The State Bank of Omaha
Savings Department

Pays Interest on Deposits
Foreign and Domestic Exchange
Travelers' Checks and Letters of Credit Issued
Safety Deposit Vaults

Deposits Protected by the Depositors'
Guarantee Fund of the State of Nebraska"

The size of same is 38 inches high, 20 inches wide.

Over the customers' counters inside the bank in num- [fol. 227] ber, the signs are as follows:

"Safety First

All Deposits in This Bank Are Protected by Depositors' Guarantee Fund of the State of Nebraska"

The size of same, 15 inches high, 20 inches wide. Over the discount and paying teller's windows, the sign is as follows:

"Deposits Protected by the Depositors' Guarantee Fund of the State of Nebraska"

The size of same, 6 feet 10 inches long, 3 inches high. Over the receiving teller's windows, appears the same lettering of the same size. Over the other receiving teller and statement window appears the same lettering of the same size. Over the Savings window and Tellers window of Savings Department, appears the same letters of the same size.

On the entrance from the lobby on the 16th street side is the following:

"The State Bank of Omaha

Banking Hours 9 A. M. to 2 P. M.
Saturdays, Commercial Department, 9 A. M. to 12 M;
Savings Department, 9 A. M. to 2 P. M.

Deposits Protected by the Depositors' Guarantee Fund of the State of Nebraska"

The size of same being 42 inches high, 23 inches wide.
[fol. 228] Clear above the doors on a large glass in the way of a transom entering from the lobby on the 16th street side is the following sign:

"The State Bank of Omaha

Deposits Protected by the Depositors' Guarantee Fund of the State of Nebraska"

This sign is about 30 inches high, and 48 inches wide.

1190 Q. Mr. Schantz, your bank is situated on the southeast corner of 16th and Harney streets in the city of Omaha, in the business district, is it not?

A. Yes sir.

1191 Q. The space it occupies is the first floor of that building is it not?

A. The rear of the first floor.

1192 Q. With entrances from both the 16th street side and Harney street side?

A. Yes sir.

1193 Q. These advertisements you have referred to, do they appear on the main street doors of each entrance?

A. On the main street doors on the Harney street entrance and the lobby doors of the 16th street entrance.

1194 Q. The lobby doors on the entrance to the bank from the elevator lobby?

[fol. 229] A. No sir. It is the bank entrance from the elevator lobby.

1195 Q. Yes. Now, advertisements on these doors have been there for how long?

A. Since October 1915.

1196 Q. About what dimensions are they?

A. I don't know. They are small letters.

1197 Q. Any way, as they are now they have been since 1915?

A. No change.

1198 Q. Mr. Schantz, as to such banks as are interested in promoting this suit, are you on a committee representing them?

A. I have been elected chairman of a committee of three.

1199 Q. Some time prior to the institution of this suit?

A. Shortly prior.

1200 Q. Who are the other members of the committee?

A. Dan Stephens of Fremont and William Seelenfruend.

Mr. Abbott: I think if it is agreeable to you Mr. Gaines, we might take a recess at this time until this afternoon so as to secure some other information I desire to get and for the further taking of testimony.

Mr. Gaines: Very well.

Recess taken at 11.50 A. M. until 2.30 P. M.

[fol. 230] 2.30 P. M. all parties met, in accordance with recess taken at luncheon time, when the following proceedings were had and further testimony taken.

Stipulation

It is agreed that photostat copies of the certificate of deposits, defendants' Exhibits 31 and 32, may be made and used with the same force and effect as if the originals were produced.

A. L. Schantz, recalled to the stand for further direct examination.

By Mr. Abbott:

1201 Q. Mr. Schantz, since you testified this morning has your attention been called to two signs hanging over each of the depositors or customers counters in the lobby of your bank?

A. Yes sir.

1202 Q. And has your attention been called to two or three long signs across the top of the cages of the bank,

just above the windows where the receiving and paying tellers and officers of your bank are located?

A. Yes sir.

1203 Q. You may now describe those signs?

A. The signs over the depositors' counters are about 15 inches high and 20 inches wide and the wording is as follows: "Safety first. All deposits in this bank are pro-[fol. 231] tected by depositors guarantee fund of the state of Nebraska." The signs over the receiving and paying tellers and statement windows are about six feet ten inches long, and three inches high, the wording being as follows: "Deposits protected by the depositors guarantee fund of the state of Nebraska."

1204 Q. Mr. Schantz, how long have those signs been there?

A. Since October 15th, 1915.

Mr. Abbott: That is all for the present.

Witness excused.

[fol. 232] A. L. SCHANTZ is here recalled for further Direct examination.

By Mr. Abbott:

1205 Q. Mr. Schantz, you heard the testimony of Mr. Nelson with respect to monthly statements made up by the State Bank of Omaha?

A. Yes sir.

1206 Q. You are familiar with those statements?

A. I am familiar with the books. I don't know what statement he is referring to.

1207 Q. Mr. Schantz, you heard the testimony of Mr. Nelson with reference to monthly statements showing the matters he has referred to as contained therein. Do you know of such statement?

A. Not that I know of.

1208 Q. What record are there showing the transactions of the bank and the disposition made of them?

A. Different departments where the earnings are made up.

1209 Q. I mean a compiled statement.

A. We have no compiled statement.

1210 Q. You want to be understood Mr. Schantz as telling me that the State Bank of Omaha does not have some statement showing the transactions for any period and the expenses for a similar period?

A. We close our books every night. Our daily statement shows it. Every night the books of the bank are closed and the daily statement shows the net transactions.

1211 Q. You prepare a statement then periodically from this?

[fol. 233] A. No sir, except when calls are made four times a year, then they are taken from the last statement.

1212 Q. In making up this statement for the Department of Trade and Commerce how many of them do you make up? Do you make them in duplicate?

A. What are you referring to?

1213 Q. The statement you send to the Department at Lincoln.

A. Yes, they are made in duplicate.

1214 Q. Do you retain a copy?

A. They send one back.

1215 Q. You have those statements?

A. We have some of the recent ones.

1216 Q. I wish you would please obtain such statements or other records from your bank as are necessary for that purpose that you may, either by introduction into the record or by your testimony therefrom, give me the earnings of your bank for the year 1928; that is, the gross earnings and the amount of earnings applied to expenses, the amount charged off as against bad debts, and the amount paid for any other purpose or charged off for any other purpose and the net earnings for the year. I am not asking for minute detail. I do not care to have access to the names of the debtors where debits were reduced or charged off. I need the foregoing information to meet the allegations in the petition filed in this suit, and what I desire to interrogate you with reference to, is solely as to the earnings and the disposition made of them.

[fol. 234] Mr. Gaines: The plaintiff objects to producing the bank books showing its gross earnings or how these earnings have been allocated. These matters are all subject to examination by the defendant and have been examined. If the defendants want to make an examination

of the books of the bank there will be no objection made to that, but this bank is unwilling to make it public property as to the gross earnings and the allocation of same. If, however, in the trial of this case, such information is requested and the court rules it will have to be given, the information will be forth-coming.

Mr. Abbott: The defendants insist on their right to have these records produced that they may examine with reference to each succeeding question and the information it may elicit, and object to be relegated to any record at Lincoln or any future order of the court, and challenge attention to the fact that a subpœna duces tecum was issued in this case and served upon Mr. Schantz on January 16th, 1929 expressly requiring the production of all records showing the earnings of the bank and the disposition made thereof and ask the Notary to attach his subpœna to this deposition.

[fol. 235] Mr. Gaines: The plaintiff states this bank, the State Bank of Omaha, is subject to inspection by the Department of Trade and Commerce at any time under the law, and hence the information requested by counsel now is available to the Department and may be obtained by them. This witness does not propose to produce the books of the bank in order that plaintiff may make it public property in the form of a deposition, unless the court so directs. The plaintiff stands upon its objection. Mr. Schantz will be present at the trial of this case in Lincoln. If the Department wants to obtain this information from Mr. Schantz then as a witness, he will be present and if the court directs that that information shall be made public property it will be forth-coming.

Mr. Abbott: The defendants insist upon their request and challenge attention to the fact that the witness is not the judge of the manner in which the plaintiff and defendants procure their testimony before the trial; that these depositions are being taken in Omaha for the express purpose of getting accurate information where the books and records are available, and again challenge counsel's attention to the limitations heretofore placed upon the purpose for which the books are sough- to be produced.

[fol. 236] Mr. Gaines: The plaintiff stands upon the objection made by counsel for plaintiff. Plaintiff will make

the same objection with respect to any bank that is subpœnaed, inasmuch as the defendants have access to the books of each of the banks, and hence have the information requested, and they may make it public property if they wish to if the court so orders. Counsel for the State Bank will now state that we are perfectly willing that Mr. Abbott himself may go down and examine the report in the bank and the bank records and specifically any charge made against it, but we are not willing to make that public property.

Mr. Abbott: In reply counsel for defendants states that he does not quite understand how, if he would examine the records, but was denied the right to put the particular matters in evidence, how it would avail his client any.

Mr. Abbott: That is all.
Mr. Gaines: That is all.

Witness excused.

[fol. 237] Stipulation

It is hereby stipulated and agreed by and between counsel for the respective parties that these depositions may be extended into typewriting outside the presence of the witnesses, and that the signatures of the witnesses to said depositions are expressly and specifically waived.

[fol. 238-239a] State of Nebraska,
County of Douglas, ss:

I, W. Whittaker, a Notary Public duly appointed, acting and qualified in and for the County of Douglas and state of Nebraska, do hereby certify that, the witnesses, A. L. Schantz, Leo R. Wilson and A. A. Nelson were by me first severally duly sworn to testify the truth, the whole truth and nothing but the truth, and that the depositions by them respectively given as above set forth were reduced to writing by myself—the presence of the witnesses during the extension of same into typewriting and the signatures of said witnesses to these depositions being expressly and specifically waived—and the same were taken at the time and place in the annexed notice specified; that I am not counsel, attorney or relative of either party or otherwise inter-

ested in the event of this suit, and that said depositions were completed at the time specified.

In Testimony Whereof, I have hereunto set my hand and affixed my notarial seal this 21st day of January A. D. 1929.

W. Whittaker, Notary Public. (Seal.)

Notarial fees for taking, transcribing, oaths, certificate, photostat copies, issuance of subpœnas and service of same, witness fees and postage, $34.55, paid by defendants.

(Here follows Exhibit 13, side folios 240-265, inc.)

[fol. 266-281] Mr. Geo. W. Woods, called as a witness on behalf of the defendants and after being duly sworn, testified as follow:

Direct examination.

By Mr. Sorenson:

1217 Q. Give your name?
A. George W. Woods.
1218 Q. Where do you live?
A. Lincoln.
1219 Q. How long have you lived in Lincoln?
A. Thirty years.
1220 Q. What is your business?
A. Banking.
1221 Q. With what bank are you associated?
A. Lincoln State National Bank and Trust Company.
1222 Q. What is your position with that Bank?
A. Cashier.
1223 Q. How long you been cashier?
A. Twelve years.
1224 Q. State to the Court your basis for observation and knowledge of banking in Nebraska.
A. Well from, you mean since I have been in my present position or before?
1225 Q. From 1901 on down to present time.
A. From 1901 to 1917 I was traveling representative of R. G. Dunn and Company.

40 EXHIBITS 2 AND 3 OF EXHIBIT 13

Pages 110 and 111

A Story no other State can tell

NEBRASKA today tells a story to her sister States that no other State can tell. It is a story with a background of shadow but with highlights of courage and stamina.

The Shadows came with deflation days, but back of those shadows there was a sound law and sound bankers in Nebraska. They had the courage and the grit to see it through.

Were a title needed for this story it might be written, "Seeing It Through." Under the operation of Nebraska's sound law, the Bank Guarantee law, and in the hands of Nebraska's sound bankers, not a dollar has been lost to the depositors in Nebraska's state banks. The funds of these depositors are intact. As the liquid capital of the business firms, of the farmers, and of the workers these protected deposits are continuing to do the work of the state.

Seeing it through has called for the payment of millions of dollars to the Guarantee Fund by the state bankers of Nebraska. Under efficient supervision, with the finest spirit of co-operation and with a sacrifice of personal gain that has proved the mettle of every state banker, the Nebraska plan has been carried on until it is possible to tell this story that no other state can tell.

Each Sunday and Wednesday will appear in THE OMAHA BEE this story of Nebraska's financial strength.

It will hold a thrill for the people of Nebraska, for the men and women in business, for the farmers and the workers in field and factory. Read the chapters, told in graphic form as the story unfolds. Mail them to friends in other states that they may learn of the strength and courage that has made it possible.

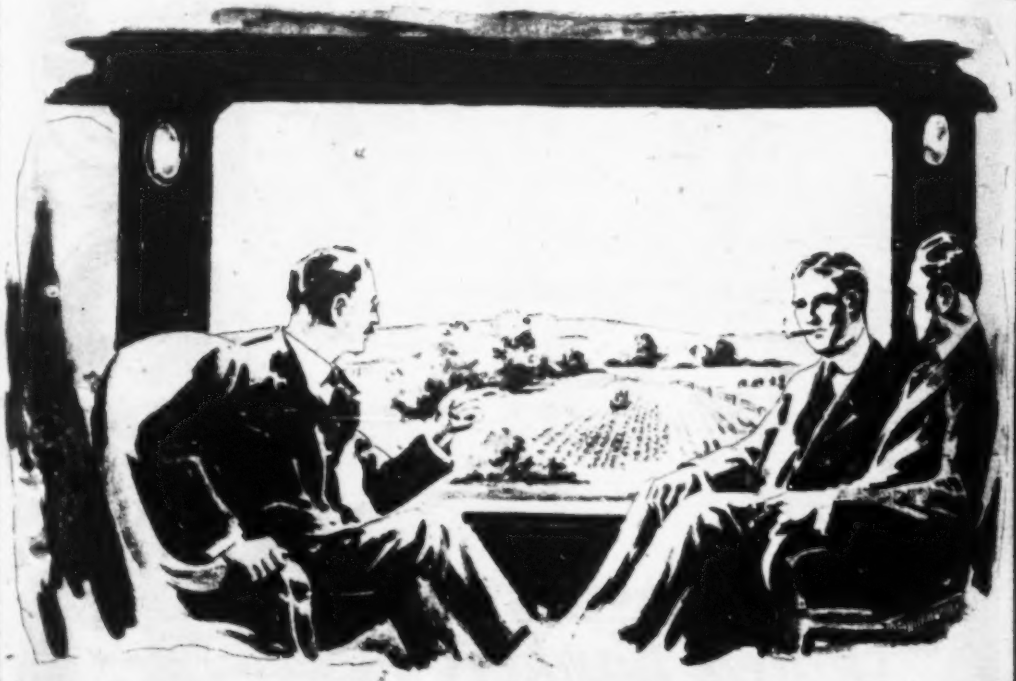
In the hands of *skilled bankers*

LLED bankers administer the
ska law that protects the deposits
Nebraska state banks. The Guaran-
Commission is the official body, and
law, membership on the commission
to state bankers.

anker members are appointed by
nor of Nebraska from names sub-
by members of the state. Thus the
the commission is free from politics.
tary of Trade and Commerce in the
's cabinet is ex-officio chairman of
mmission and in this way the elected of-

ficials of the state government co-operate with the banker selected members of the commission to insure the most efficient administration of the law.

From headquarters at the state house in Lincoln the Secretary of the Department of Trade and Commerce is in touch with every bank in the state. The constant effort of the Commission is to so handle the affairs of the failed banks as to secure the largest possible returns from the disposal of assets to the end that Nebraska's reputation for sound banking may be guarded.



Nebraska is a *Remarkable* State!

First Traveler—"I was reading the business chart the other day and I noticed Nebraska listed as one of the bright spots, do you know the reason?"

Second Traveler—"Yes, Nebraska is really a remarkable state. In agricultural products there is raised here a surplus of four out of five of the world's basic needs, corn, wheat, cattle and hogs."

Third Traveler—"But that is not the whole story. Nebraska's financial institutions are on a solid foundation. Bank failures have been fewer here, and under the state law the deposits in state banks are protected. This law has been in effect about 15 years and during that time some $26,000,000 in deposits in failed banks have been paid back to depositors under that law.

Nebraska was hit by the depression, of course, but while it had to stand the gaff of low prices, its financial structure has come through more solid than ever and the people still have the saved-up wealth represented by their protected bank deposits. A check drawn against a deposit in a state bank in Nebraska is as safe as a banknote."

The Record of Nebraska's Financial Stability:

606 State Banks	$285,000,000 deposits
170 National Banks	202,000,000 deposits
66 Insurance Companies	182,000,000 assets
84 Building & Loan Assns.	142,000,000 assets
34 Trust Companies	60,000,000 assets

Nebraska produces in new wealth each year: Farm products, $500,000,000; products of industry, $800,000,000.

The wealth of Nebraska in men and materials is covered by insurance; life, fire and casualty, to the amount of $5,000,000,000 for which its people pay in annual premiums more than $45,000,000.

The Opinion of the Highest Court

THE constitutionality of the Bank Guarantee law of the State of Nebraska was submitted to the highest court in the nation.

In sustaining the law the court said:

> *"When the legislature (of Nebraska) declares in its banking laws that incorporation, inspection and co-operation for the protection of deposits are necessary safeguards, this court certainly cannot say that it is wrong. The power to compel beforehand, co-operation and thus, it is believed, to make a failure unlikely and a general panic almost impossible, must be recognized if government is to do its proper work.*
>
> *"In our opinion the statute before us is well within the state's constitutional power."—United States Supreme Court.*

Under the laws of the state of Nebraska the banks within the state banking system "co-operate for the protection of deposits" as outlined in the excerpts here printed from the opinion of the Supreme court of the United States.

The purpose of the laws of Nebraska and of the co-operation among the state banks is to "make a failure unlikely and a general panic almost impossible."

The prevention of individual failures has not yet been accomplished by the state banking system, but not a depositor in a State bank in Nebraska has lost a dollar since the law was enacted. Further experience and further operation of the Nebraska banking laws are moving in the direction of cutting individual failures to a minimum by bringing to the state banking system the counsel and experience of the state's best bankers. The program of bank co-operation has, however, made a general financial panic "almost impossible." The protected deposits in the failed banks have been kept intact and thus large portions of the liquid capital of the people of the state, have been continued at work in the business life of the state. It has increased safety and built confidence, the foundation stone of prosperity.

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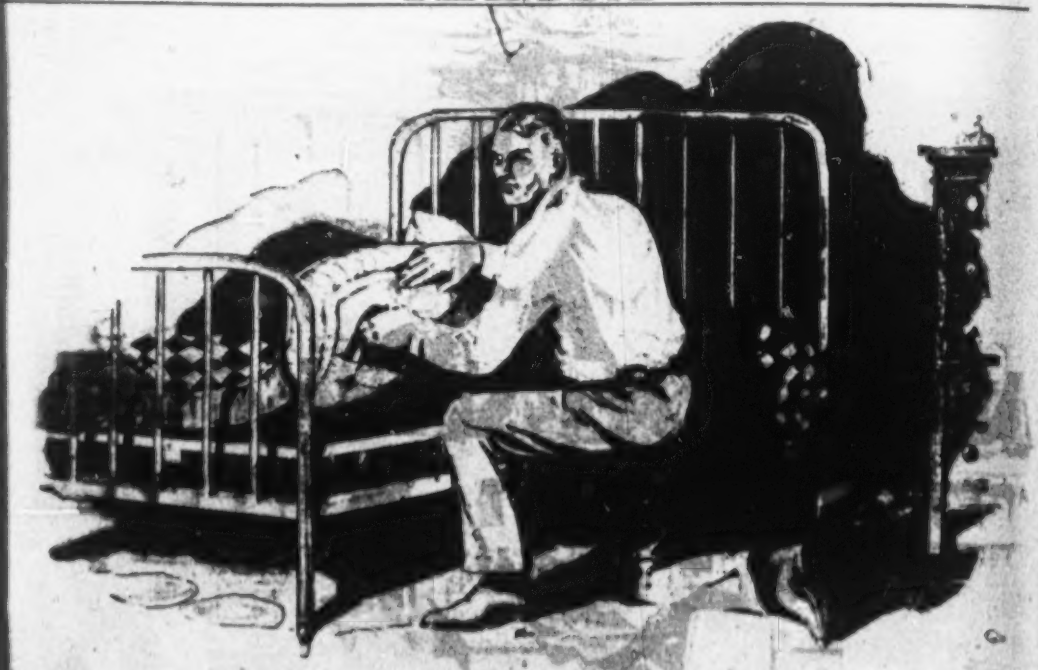
244 EXHIBITS 6 AND 7 OF EXHIBIT 13

Pages 114 and 115



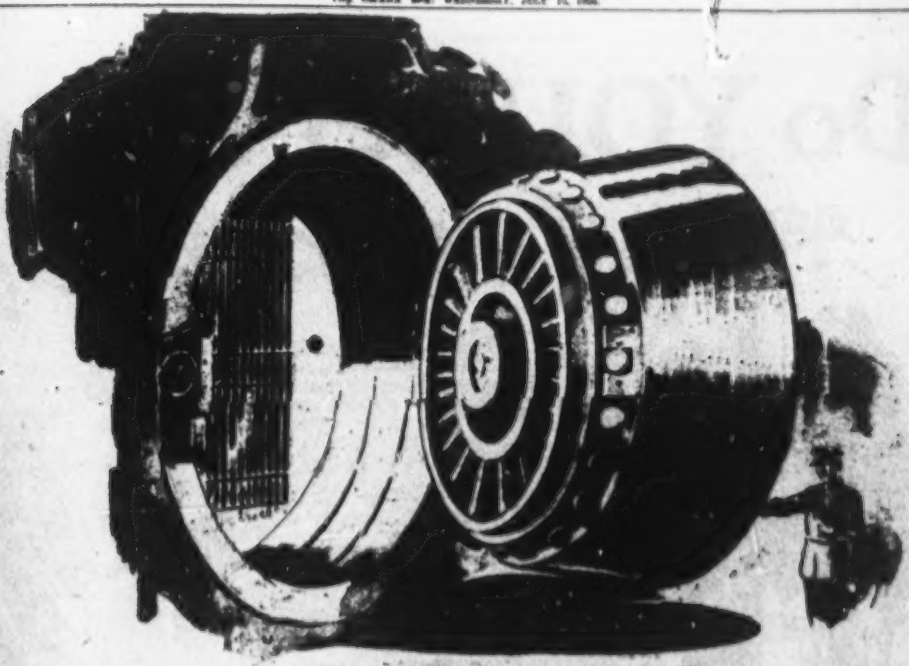
No Mattress Banks in Nebraska

ONCE upon a time money and valuables were kept in strong boxes in the home. There was no other place to keep them. There were no banks as we know them today. With the coming of banks, money was placed on deposit and valuables of other kinds were put into safe deposit boxes.

In the early days of banking there was naturally a backwardness about placing money on deposit. As banks grew stronger and banking systems better organized this timorousness about entrusting money to banks practically disappeared.

In Nebraska there is no longer any need to keep the money in the mattress, in an old woolen sock or hidden away in a tin can. The State Banks in Nebraska are associated together under the law for the mutual protection of their deposits. There have been bank failures in Nebraska. But there has been a lower proportion of failures in Nebraska than in most states. A strict system of State bank examination is constantly improving conditions. Under the Nebraska Bank Guarantee Law, those who once were fearful of banks and kept their money hidden away in the mattress have brought it out and put it to work as part of the capital included in the general bank deposits, for use in the development of the state.

The deposits of the big business house, the money that is being laid away for the purchase of a home and the dimes and pennies that are deposited in the baby's savings account are all safe in the State banks of Nebraska because deposits are protected.



A Message of Strength

THE bankers in Nebraska's state banking system send a message of strength to the people of the Nation. Fifteen years ago the state banks of Nebraska associated together under the law for the purpose of making certain that in this state depositors should no longer be dependent upon the turn of the business cycle, nor upon the skill or lack of skill of the individual banker for the safety of his capital or of his savings, entrusted to their care.

During this period the world war came upon us with its dislocation of business. Following this came the period of inflation preceding our own entry into the war. Then our own war years with their immense loan drives and the hectic financing that accompanied those years.

Then came the post-war inflation period when the nation lost its financial balance and industry and agriculture from the heights of inflation were precipitated into the depths of deflation.

The experience of those years was more than the ups and downs of the business cycle; it was the twistings and turnings of a world flushed with success on one day and chilled with depression the next.

Here and there individual banks in the Nebraska state system were unable to stand the strain and went under. There were losses in Nebraska as there were losses in every state in the Union.

Of all the state systems, however, the Nebraska system alone came through solid, solvent and without loss to a single depositor. The Nebraska state bank system as a whole absorbed the losses of the unit state banks that went under and on the surface of the financial sea of Nebraska's state banking system there were only a few ripples that told of the depths of the currents underneath.

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Pages 116 and 117

THE OMAHA SUNDAY BEE — PHOTO-ART SECTION

Do YOU believe in *Insurance?*

LIKE a giant insurance company the state banks of Nebraska are associated under the laws of Nebraska for the protection of the deposits of the State Banks. Men provide for the insurance that goes to their dependents after death by paying for it. The insurance of the deposits placed in the state banks in Nebraska is paid for by the bankers. It is held by some that if private funds build up an estate through life insurance it would be equally just that private funds should contribute towards the insurance of the estate built up through bank deposits. But it isn't. Whether there is ever any modification of this plan is in the hands of the future and depends upon how the people look at it as a matter of justice. As things now stand it is all paid by the state banks. To many of the state banks it has meant the sacrifice of profits over a period of years.

The purpose of this chapter in the story that only Nebraska can tell is not to discuss this point, however; it is to call attention to the fact that the system that has made this possible is like a giant insurance company.

The combined deposits in the banks of the banking system in Nebraska is $296,000,000, the funds of more than 500,000 depositors. The men and women who are these depositors and whose money is in these banks know that it is safe because under the workings of the giant insurance plan, these deposits are protected.

This insurance plan not only protects the deposits in the bank, it protects the sleep of 500,000 depositors and their peace of mind. It protects the business that is dependent upon these deposits. It protects the farmer whose funds on deposit are to be used for the clearing of the mortgage or the stocking of the feed lot. It protects the worker whose funds in the bank are being saved against the day when he and his wife and little ones can move into the new home on the hillside.

A giant insurance plan, filled with the spirit of confidence and trust because the money in the bank is safe.

Chartered A Story By Other Nebraska Line Full Omaha Bee, June 10, 1928
Copyright, Omaha Bee, 1928

Nebraska is going ahead

State Banker

"Nebraska is glad to have you gentlemen come here to make this state your home. Your deposits in this bank are protected under a plan whereby the state banks as a whole are associated under the law and through a system of assessments and central control, your deposits are safe. If a bank fails for any reason we jointly pay the loss."

New Business Man

"This plan of protecting deposits, operating for state banks under the laws of Nebraska is the thing that has finally determined my selection of Nebraska as the state where I want to establish my business. Because of this I expect to find a confidence in your financial institutions that will make business here a pleasure as well as a matter of profit."

New Farmer

"It settles the matter for me, the safety of my bank deposit is vital. We farmers do not have a quick turnover and cannot change our course as the markets change. I am glad I can come to Nebraska and put my cash in the bank and go to sleep at night, without worry."

The funds in the State Banks of Nebraska are intact. In plans for business expansion and future development much depends upon the ready cash in hand. In Nebraska the ready cash of the people deposited in State Banks is intact, ready for use in the business life of the state.

As in all the states in the Nation, Nebraska had its bank failures, particularly during the deflation period. In Nebraska however, there were no losses to depositors in state banks. The funds of these depositors, big and little, are intact. They were paid back dollar for dollar under the workings of the Nebraska Guarantee law. Under this law the state banks assess themselves for the amount of the deposits in the failed banks and make it good to the depositors. Therefore, because this has been done by the state banks and because the deposits of the people of Nebraska are intact, Nebraska is at all times ready to go ahead. Nebraska is now going ahead and Nebraska invites business men, farmers and all other home seekers to come here, make their homes here and take part in the work of developing Nebraska toward an ever brighter future.

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EXHIBITS 10 AND 11 OF EXHIBIT 13

Pages 118 and 119

Surely,

That Check is drawn on a Nebraska State Bank

Salesmanager: (a conversation in 1922). "Chief, I've been hearing more disquieting rumors about business conditions in the agricultural states and I think we ought to be more careful than usual. Here is an order and a check from Jones & Company; do you think we should ship the goods until we can find out something about the bank on which this check is drawn."

President: (examining check) "Surely, ship it. This check is drawn on a state bank in Nebraska. We've been doing business with Jones for years and we know they have ample deposits, also we know that in Nebraska the state bankers protect each others' deposits under the State Bank guarantee law. That check is good."

Many conversations like the above in many business houses, took place in 1922, when the depression days were darkest. But, then as now, the Nebraska merchant who draws his check on a deposit in a state bank, in Nebraska, had that check honored.

This illustrates the soundness of Nebraska finance, even in the darkest days. It shows as nothing else can the value to the state as a whole of the state bank Guarantee law. It illustrates the manner in which this guarantee system keeps business going as usual. It is part of the story that no other state can tell.

In the "thin Plaster" Days

TIME was when there was practically no government control of banks or banking practices. Those were the days of "free banking" and money was issued with no segregated reserves behind them. When banks went under there was not only put in jeopardy the funds on deposit, but the money issued by the failed banks was usually worthless. Those were the "thin plaster days. In hundreds of attics in Nebraska homes there are old trunks in which are hidden away samples of this oldtime thin plaster money.

The strong men in both the banks and the government realized that such a situation could not be permitted to continue. The result was the banking laws of today in both state and nation. We never worry now about the money in our billfold. Sound banking laws guarantee their payment out of segregated reserves and it makes no difference to the holder whether the bank that issued them is a strong bank or a weak bank. The bank can fail, but the money is good. Because the system back of the money is sound.

In Nebraska, the bankers and the state legislature realized that safety of bank deposits was as essential as safety of money issued by banks. Both are forms of credit, necessary to modern business. The check that is drawn against a deposit is even more widely used as a form of credit than the money issued by the banks. Nebraska has organized a system to protect these checks, by protecting the deposits against which they are drawn. State banks authorize checks and under the Nebraska state system of protecting deposits, these checks, drawn on deposits in state banks in Nebraska, are as safe as money. The safe, confident conduct of business makes it necessary that as far as the systems of men can make them, all forms of credit should be safe, bank deposits and the checks drawn against them, as well as money.

Deposits in this Bank protected under Nebraska Bank Guarantee Law

Copyright, 1916, The Omaha Bee

Pushing your money *through the Window!*

CONFIDENCE in the banks of the United States is the greatest expression of confidence of which there is any record. It is a confidence well placed. The great banking structure of the nation is sound. Bank failures, whether they result from poor banking practices, from runs on banks, which if continued, no bank can withstand, or from dishonesty on the part of bank officials, are relatively few in number. As an expression of confidence in State banks in Nebraska these banks have total deposits of nearly $250,000,000. The deposits in the state banks in Nebraska that have failed during the last fifteen years—during which time the nation has gone through one of the greatest financial crises in its history—amounted only to about $25,000,000, less than 10 per cent of the total.

Those who pushed their money through the teller's window of these failed banks may have had in their deposits the total of their life savings. It may have been the bulk of the capital with which their business was conducted. To them, the loss of these deposits would have meant real hardship and in many cases disaster.

In the State Bank System of Nebraska happily, the depositors who pushed their money through the windows of the failed banks, as well as those who pushed their money through the windows of the sound banks, have not lost a dollar.

The sound character of the state banking system in Nebraska has been built up under the Nebraska Bank Guarantee law. It is the one law of its kind that has stood the test of the financial crisis that came with the deflation period. The Nebraska state banking system stands alone with its record of not a dollar lost to depositors. When you push your money through the window remember that the story of the Nebraska state banks—

Is a Story That No Other State Can Tell

Where have we got our money *John?*

Mother--"I notice in the paper John that some banks down south have failed. Think of all the money those people down there will lose. I'm just wondering where we've got our money."

Father--"It's all right Mary, the money is in the State bank in town. I tell you that Guarantee law in Nebraska is a mighty fine thing. We can go on about our affairs and know that even if our bank goes under we will get all our money because the other state banks will make it good."

When the news was printed recently of the failure of a group of banks in two southern states it is probable there were conversations similar to that reproduced here all over Nebraska. The sense of security that is the possession of the depositors in state banks in Nebraska is one of the greatest benefits of the Nebraska Bank Guarantee law. In the old days, before the Guarantee law, a feeling of terror ran through a community whenever there was a rumor that a bank was in danger.

Now there are only a few casual inquiries. The depositors go about their business without uneasiness and without worry. They know that the deposits in the state banks in Nebraska are protected deposits and that even if a bank is closed and finally liquidated they will have their money returned to them in full under the operation of the Nebraska Bank Guarantee law, to which all state banks in the Nebraska state system subscribe.

This is a Story No Other State Can Tell

Chapter 13, "A Story No Other State Can Tell." The Omaha Bee, August 4, 1933. Copyright, 1933, The Omaha Bee.

EXHIBITS 14 AND 15 OF EXHIBIT 13

Pages 122 and 123

In Nebraska the guarantee works both ways!

STATE BANKER: "There's an interesting thing about this little transaction we have just closed. We are both protected. We have on deposit in this bank $5,000 of your money. Under the laws of the state of Nebraska, this state bank is joined with all other state banks in protecting that deposit, and in protecting all of the deposits in all of the state banks.

"I have just loaned you an additional $5,000 and you have given me security for it in the shape of collateral that I, as a banker, know is good. I know that this bank will get that loan back, no matter what happens to you. You know that your deposit is safe, no matter what may happen to this bank. It is a fair deal both ways."

BORROWER: "You know the biggest thing about that for both of us? We can both sleep at night."

Here we have another chapter that illustrates the confidence and the peace of mind that good banking has brought to Nebraska, to both bankers and depositors. It is worth more than a gold mine to Nebraska. The depositors and the borrowers from Nebraska state banks know that the guarantee works both ways.

IT'S A STORY THAT NO OTHER STATE CAN TELL!

The Money in your Pocket!

Run your hand into your pocket and take out the money you have there. Look at it for a few minutes while you read this story. That $5 bill; maybe it is a United States treasury note, maybe it was issued by the Federal Reserve System; maybe it is a National Bank note. We will forget the coins for a minute.

But that paper money? There is no intrinsic value in the paper, yet you never worry about it. You know that a piece of paper marked $5 or $10 or any other amount, so long as it is a part of Uncle Sam's system of currency, is good. Now why is it good? Because under our banking laws the national banks of the country have deposited in reserve, enough securities to take up whatever amount of these pieces of paper might at any time be presented for payment. If that $5 bill is a bank note, you do not worry about the bank that issued it, and it doesn't make any difference to you nor to the value of that bank note, whether the bank is solvent or is on the verge of going under.

All of this is as it should be because if we had to worry about the value of the money in our pockets we could never do business of any sort.

Now how about that check you gave to your dealer when you bought an automobile? You have plenty of funds in the bank, many times more than enough to meet that check, but suppose the bank fails before the check is paid?

In Nebraska, under the Nebraska Bank Guarantee Law, the state banking system protects deposits and so protects checks drawn against deposits. It compels the setting up of reserves by the state banks to meet any demand that may be made for the payment of checks drawn on deposits in state banks. In Nebraska you need not worry about the check drawn against your deposit in state banks any more than you need worry about the money in your pocket.

THIS IS A STORY NO OTHER STATE CAN TELL

Chapter 14, "A Story No Other State Can Tell." The Omaha Bee, August 11, 1928.

Copyright, 1928, The Omaha Bee.

95,000 Years of Labor

MONEY is a medium of exchange we are told. But it is much more than that. If we will remember the means through which we get money—profits—salary, wages—we will realize that money is that thing which represents our services, our labor. We do not get any money unless we render service of some sort, unless we do some sort of labor. We cannot work for everyone, but the money we get for our labor at the place where we work, either as proprietor or as employee, enables us to trade that money to others for what their labor has created.

Some of the money we get we save. In saving our money we save a part of our labor. Thus our money in the bank is saved up labor that we can take out when we need it to trade to others for the fruits of their labor.

In the state banks of Nebraska there is on deposit the stored up labor of men and women, represented in $288,000,000. If one man could earn this sum at the rate of $10 a day, it would take him 28,800,000 days. That is impossible of course. But if we could command the labor of 95,000 men and women and put them to work at $10 a day it would take them all of the 300 working days of a year.

They could use none of their earnings during that time but would have to put it all in the bank.

Thus the money on deposit in the state banks in Nebraska represents a huge total in stored up labor. It has been stored away in the state banks for use some day when the depositors need it.

Now we begin to realize why it is so important that these stored up millions of dollars, these stored up centuries of labor of men and women, which the state banks in Nebraska have in their custody, shall be at all times safe and certain.

When state banks fail in Nebraska the money of the depositors is not lost. Under the operation of the Nebraska Bank Guarantee law all of the banks join together to absorb the losses. This Guarantee law has been in operation in Nebraska for fifteen years and during that time the deposits in failed banks have totaled $36,000,000. This in itself is nearly 9,000 years at $10 a day of the saved up labor of the men and women of Nebraska.

Small wonder that in the fifteen years the Guarantee law has been in operation among the state banks in Nebraska the deposits in these banks have grown from a little more than $70,000,000 to nearly $288,000,000.

It is a splendid thing to live in Nebraska and to know that the money placed in the state banks in this state is safe. As a Nebraskan, too, it is a splendid thing to know that this is—

A STORY NO OTHER STATE CAN TELL

Slogan 16, "Safety No Other State Can Tell." The Guarantee

Copyright 1916, The Omaha Bee

What is a Bank ?

Modern business requires great reservoirs of capital from which to draw the funds with which to keep going the wheels of business. These reservoirs of capital are made up of deposits of the people, big and little deposits.

These funds of the people, on deposit in the banks, are loaned to business men, for the conduct of business big and little. Our present day social structure would be impossible, were it not for these great reservoirs of capital.

From the standpoint of the men and women who deposit their money in banks, the chief consideration is that it shall be safe.

In the state banks in Nebraska, the deposits, of more than 550,000 men and women go to make up the total of the funds on hand. In view of the fact that the banks make use of these funds as loans to aid in carrying on business within the state, it is but natural that banks are looked upon as rendring the greatest of public service.

Rendering a public service as they do, and in doing so using the money of the people that is placed with them, the laws of Nebraska provide that the members of the state banking system shall set aside reserves, which they do in the form of assessments, to cover any losses to depositors which may follow the failure of individual banks.

Thus the state banks in Nebraska protect the deposits in state banks and since the starting of this system some fifteen years ago the state banks in Nebraska have paid back to depositors in failed state banks all of the funds which the people had on deposit there, a total of $26,000,000.

With these facts in mind we realize that answering the question, "What is a Bank?" is a different proposition in Nebraska than in another state.

In Nebraska a state bank is a financial institution that takes the deposits of the people; loans out these funds to manufacturers, farmers and merchants and in return joins with the other state banks in the Nebraska State Bank System, to guarantee that if for any reason—dishonesty, careless banking or financial depression, individual banks here and there in the system, shall fail, the funds on deposit will be returned in full to those who made the deposits.

Because of this system Nebraska offers a better field for the doing of business and for the laying away of funds in the bank by those who seek through their savings to build financial independence for themselves.

This Is a Story No Other State Can Tell

Chapter 10, "A Story No Other State Can Tell." The Omaha Bee, August 18, 1923. Copyright, 1923, The Omaha Bee

EXHIBITS 18 AND 19 OF EXHIBIT 13

Pages 126 and 127

THE SUNDAY BEE: OMAHA, AUGUST 23, 1925.

A city of half a million

OMAHA, the metropolis of Nebraska, is a city of 215,000. It is difficult to realize what a big group of people this is. If they were all gathered into one place we might be able to get an idea of the size of Omaha. But we cannot get them into one place. There is one way; however, to get an idea of how big is Omaha. Get into an automobile and drive over the city and see the hundreds of apartment buildings and the thousands of homes where the people live.

While we are on this auto trip around Omaha, trying to understand how big is a population of 215,000, let's turn our thoughts for a moment to a still bigger group—the men and women who carry their deposits in the state banks in Nebraska. They number nearly 550,000, or more than twice the total population of Omaha.

This great group of people have their money in the state banks in Nebraska. The deposits of some are commercial deposits, of others savings deposits. Their business lives, their home lives, their plans for the present and their hopes for the future are tied up in the safety of the money they have entrusted to these state banks.

It is a trust well placed. The money they have put in the state banks is safe. They know it is safe because they know that deposits in the state banks in Nebraska are protected deposits. They have seen the Bank Guarantee law in operation. Some of these depositors live in cities and towns where state banks have failed. Some of them have had deposits in failed state banks. Many of them have had deposited funds returned to them under the operation of the Bank Guarantee Law. Many have friends who have had deposits returned to them.

What better thing has ever been done for the people of Nebraska than what the state banks have done for them, holding their money safe in the bank for them. What better thing can these depositors do for their friends in other states than to tell them this story of Nebraska's state banks!

The story of Nebraska's state banks, properly told, will bring to Nebraska more people who will come here to make their homes. It will bring more men of business who will come here to establish industry. Nebraska stands alone on the safety and soundness of its state banking system.

IT'S A STORY NO OTHER STATE CAN TELL

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COURAGE
that turned Night into Day!

IF WE would know the story of the state banks in Nebraska we must turn our thoughts back to 1919. Those were the days of inflation, when the flush of high prosperity was everywhere over the land. They were great days and as we turn back our thoughts we will remember we felt that the wave of our prosperity would last forever.

Then came the night. Deflation followed inflation. Doubt and grim forebodings took the place of a joyous confidence.

Now let us stand for a moment with the state bankers in Nebraska. When deflation started and the slide down hill began, there was on deposit in the state banks in Nebraska more than $270,000,000, the saved up funds of more than 400,000 men and women, most of it out on loans to the farmers and business men of the state.

With deflation everything tightened up. The making of further loans was restricted. Loans already out were called. Thousands of farmers and business men could not meet the demand. Depositors began withdrawing their funds. General business shrunk. Banks began to break, failures and bankruptcies followed.

The state bankers in Nebraska watched this tumbling of values, knowing full well that under the Nebraska Bank Guarantee Law they not only had to stand their own losses, but they had to make good the deposits in the state banks that failed. They watched their total deposits fall from $270,000,000 to $210,000,000 within the short period of two years. They watched the mounting total of the deposits in failed banks, deposits they were pledged to make good.

Courage and loyalty and a determination to see it through, governed the state bankers in Nebraska and every dollar of deposits in the failed state banks has been paid.

The deposits made good amounted to more than $26,000,000. The harshness of the deflation days, its losses and failures were lessened in Nebraska because the state bankers had the financial resourcefulness and the courage to see it through. With night all around them, they knew that day was just around the corner if they but stuck it out. Because they stuck it out Nebraska is in better financial condition today than it has ever been. Deposits that tumbled to $210,000,000 in 1921, have climbed back to $288,000,000 in 1926, a new high level.

Courage turned our financial night into day in Nebraska. Courage made possible the telling of this story. The state bankers in Nebraska have earned the praise of the people of Nebraska and of the nation. Theirs is a record that brings a sense of pride to us all.

It Is a Story No Other State Can Tell

Chapter 16, "A Story No Other State Can Tell," The Omaha Sun, August 28, 1926.

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Giving up Profits to Support a Principle

THE funds from which have been drawn the money needed to make good the deposits in the failed state banks in Nebraska have come from the profits of the banks in the Nebraska state banking system. To many of these banks the payment of the assessments needed to make good these protected deposits has taken all of their profits over a period of years. In some of the state banks not only did it take all the profits, but the stockholders were called upon to make up the needed funds out of their personal resources.

During this period the strength of the Nebraska state bankers was tested to the utmost. It is no easy thing to see profits used to pay the losses of others. One of the leading state bankers has declared that it was a picture of Abraham Lincoln in his office that gave him the courage to stick it out.

"Lincoln had a dozen opportunities to quit," he said, "but because he stuck to it, America is today the greatest nation in the world." Because the state bankers in Nebraska stuck to it, this state is today famous among the great sisterhood of states as the only state in which not a dollar of deposits has been lost through the failure of state banks.

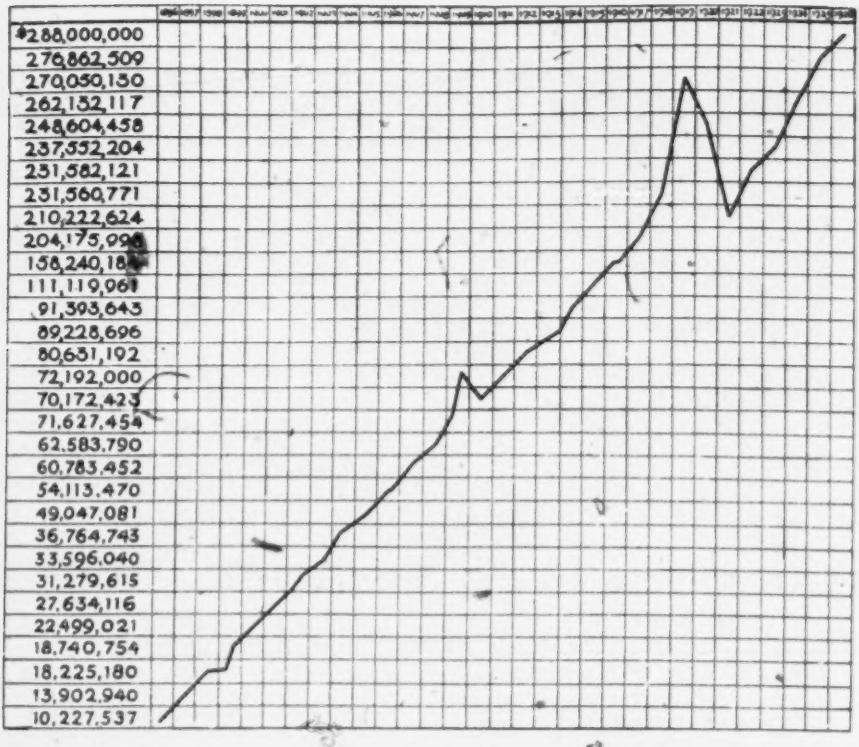
When the people of Nebraska realize the full meaning of this they will have an even greater pride in their state bankers.

There are those unfamiliar with the workings of the Bank Guarantee law who have believed that the payment of the deposits in the failed state banks was made out of state funds. Some, even, have believed that money for this purpose has been raised through taxation. Others have believed that the state bankers increased their interest rates or in some other way "passed on" this obligation to their borrowers.

No, the money to make good these protected deposits has come out of the profits of the individual banks. Interest rates in the state banking system in Nebraska are the same as the interest rates in all banks in Nebraska. The state banks in Nebraska give to their depositors all the courtesies, all the benefits that are given by all banks. The customers of the state banks in Nebraska have had none of this great load passed on to them. The people of Nebraska have paid none of these losses through taxes or in any other way. The money has come out of profits and only out of profits.

A STORY NO OTHER STATE CAN TELL

Chapter 10, "A Story No Other State Can Tell," The Omaha Bee, August 29, 1926. Copyright, 1926, The Omaha Bee.



Safe Through the Slump of Deflation Days

The test of men and of institutions comes with adversity. If all days were fair days the record of life might be a record of constant climb without ever a setback. But all days are not fair days. Dark days come when strength and courage are put to the test. The state banks in Nebraska have gone through this test. They have come out of it stronger and better.

It took 14 years, without the guarantee law to climb from $10,000,000 to $71,000,000. Under the law, only 9 years were needed to climb from $72,000,000 to $270,000,000. The slump of deflation lasted 5 years, through the last three years of which period there was a steady climb upward from the low point of 1921. Then came a new high record in 1925 and a still further climb in 1926.

During this period, in which the largest number of state banks were forced to suspend, 1921-26, the state banking system, operating under the guarantee law, made good to the depositors of these failed state banks some $26,000,000.

With a fine courage and a strength of character developed by adversity, the Nebraska state banks have climbed back to the level of pre-deflation days and passed on beyond that level. They have won a reputation for financial soundness that has earned the praise of the nation.

A STORY NO OTHER STATE CAN TELL

Chapter 38, "A Story No Other State Can Tell," The Omaha Bee, Sept. 1, 1926.

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EXHIBITS 22 AND 23 OF EXHIBIT 13

Pages 130 and 131

All work together in Nebraska

THE CHICAGO TRIBUNE recently sent to Nebraska one of its most capable investigators to learn the state of affairs here. Among other things that attracted his attention was the strength of the state banking system. Inquiry brought out the fact that this strength was tied up with the successful operation of the Nebraska Bank Guarantee Law. First, the Guarantee Law was strong because the state banking system was strong. Second, the state banking system had been developed to an even stronger position through the operation of the law.

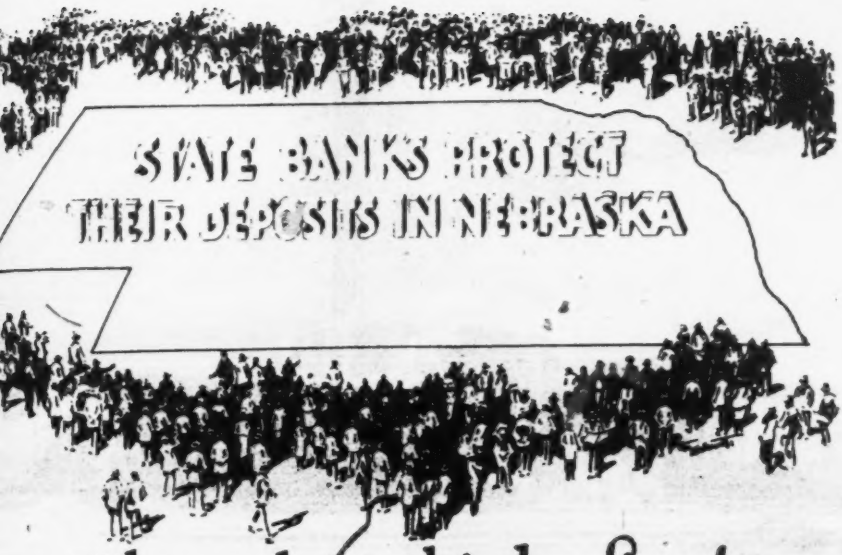
This Investigator, Mr. Arthur Evans, reported the result of his inquiries and in an article in The Chicago Tribune called attention to the fact that the success of the Nebraska Guarantee Law was due to the fact that its operations had been kept out of politics. Here is what he said:

"Nebraska kept the Guarantee Law out of politics. Analyzing the bank guarantee situation in Nebraska in contrast with other states leading bankers say: 'Unless properly administered, free from politics, the Guarantee Law is one of the worst that can be passed; but if properly operated and kept out of politics it is one of the best.'"

This is a splendid tribute to Nebraska bankers and above all to Nebraska governors and the members of Nebraska legislatures.

The law has been a process of evolution. As its operation brought out improvements that should be added, Nebraska governors have helped and Nebraska legislatures have passed the needed laws. Other improvements are required to make it better and stronger. The bankers of the state banking system have shown by their loyalty and by the strength of the state banks which they operate, that their recommendations should be heeded in any plans for the strengthening of the Guarantee Law. The law has meant much to Nebraska. It will mean more as the years go by

"It's a Story No Other State Can Tell"



What others think of us!

The eyes of the nation are on the state banks in Nebraska. The Nebraska state banks won this attention through their record of financial soundness—standing up loyally in support of the Nebraska Bank Guarantee Law.

In every section of the country the record of the Nebraska state banks is known but in many places only in a general way. Because it was a record to be proud of, a group of state bankers in Nebraska determined to tell the story in full—a story that no other state can tell.

As the story has unfolded there has been an increasing demand for copies of the various chapters. All around our borders and in distant states the interest in this story has been keen and active.

As a result of its telling, figuratively, there has been written across the state in letters that all may read, the words: "State Banks in Nebraska Protect Their Deposits." Other states have sought to provide by law for the protection of deposits in state banks, but in Nebraska alone has the plan worked out. It has not been wholly because the law of Nebraska is a better law, chiefly it has been because the state bankers in Nebraska have been better bankers.

The state bankers in Nebraska realized that the law placed an obligation upon them and that when the word went out that state bankers in Nebraska were associated under the law to protect depositors there was but one thing to do—protect them. They have protected them. The weathering of the financial stress of deflation has brought a new fame to the state bankers in Nebraska. Sound banking, loyalty in meeting obligations and the courage to make the Guarantee law means what it says, has come to be known as the Nebraska Idea.

This is what others think of us. The state bankers in Nebraska are proud that it is so. They are proud of their record. It is a record of which all the people in Nebraska may be proud. It has brought added fame to a great state.

"A Story No Other State Can Tell"

Series III, "A Story No Other State Can Tell," The Omaha Bee, Sept. 6, 1925.

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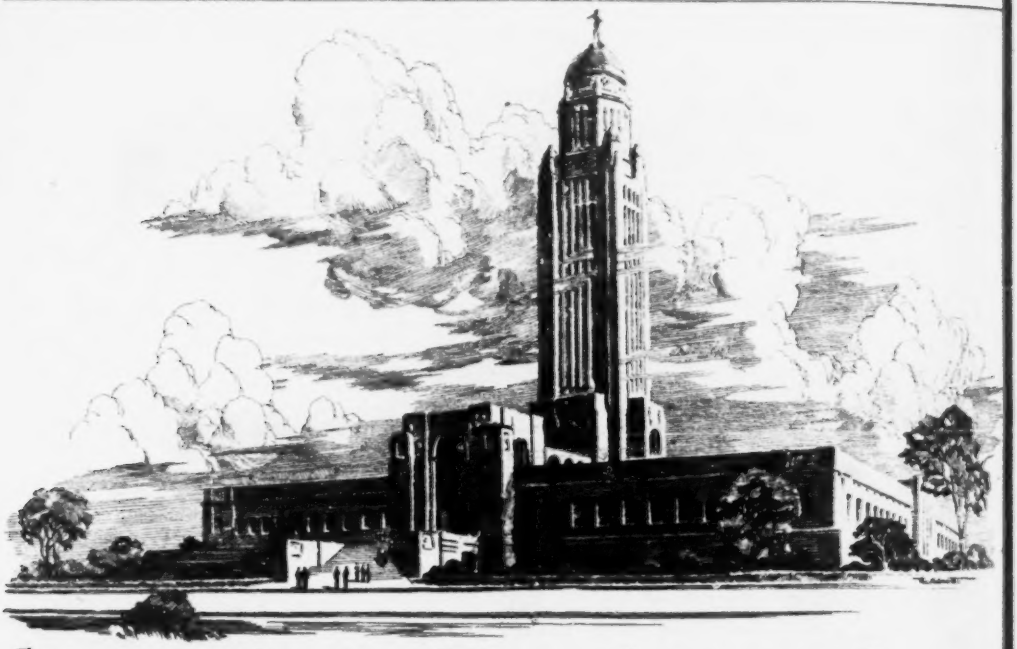
EXHIBITS 24 AND 25 OF EXHIBIT 13

Pages 132 and 133



STRONG BANKS MAKE STRONG STATES

THE banks of Nebraska are the custodians of the working capital of the people of Nebraska. This working capital is the life blood of the business of the state. Business cannot be carried on without capital. Banks as the custodians of capital are inseparably connected with every business in the state. Whether the business enterprises be large or small, whether they be in cities, in towns or on the farms the banks of the state are a part of those businesses.

The importance of the state banks in Nebraska is fully appreciated when we realize the part they thus play in the life of the state. The strength and solidity of the state banks is reflected in the strength and solidity of the state. Strong banks make strong states.

The state banks in Nebraska are strong banks. They have proven their strength by their conduct during the deflation period. In Nebraska the strength of the state banks does not depend upon the strength of any individual bank. They are associated together under the Bank Guarantee law. The strength of the individual banks therefore is the strength of all the banks.

During the deflation period a few individual state banks were not able to meet the situation and they were closed. United together under the law, the banks in the Nebraska state system met the losses of deflation days however, and conquered them. Those depositors who had their working capital in the individual banks that failed, were paid dollar for dollar by the state banks, acting together, under the Guarantee Law.

The strength of these banks has kept the working capital of the state intact. Their strength has made the state strong.

Farmers in other states, business men in other states, men and women everywhere who know the value of strong banks can find that strength in Nebraska.

"A Story No Other State Can Tell"

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Building Business on a Certainty

WHEN the balance in the bank is always assuredly a balance, and not in danger of being wiped out through bank failure, business can build on a certainty. This is the guarantee that the state banks in Nebraska furnish to business. Individual businesses may fail because of poor management or for other causes, but the great structure of business moves ahead. In Nebraska individual banks may fail through poor management or for other causes but the great structure of the Nebraska state banking sytem moves ahead.

Under the Bank Guarantee law the state banks of Nebraska absorb the losses of individual banks that go under thus furnishing to business the certainty that their bank balances will always be balances, so long as the business is sound and balances are maintained. If there is any wavering, any loss of balances, it will be the individual business that wavers, it will be the individual business that loses its funds, it will not be the state banking system.

This outstanding fact means that Nebraska offers a solid foundation for business. The business man, looking for a location, may find in this fact the determining factor, the one big thing that will turn his decision in favor of Nebraska.

Building business on a certainty, a certainty that funds are safe, a certainty that the faith placed in the state banks in Nebraska is a solid faith, is a fact that business men, both big and little, cannot lose sight of.

"It's a Story No Other State Can Tell"

Number 84. "A Story No Other State Can Tell," The Omaha Bee, Wednesday, September 12, 1928

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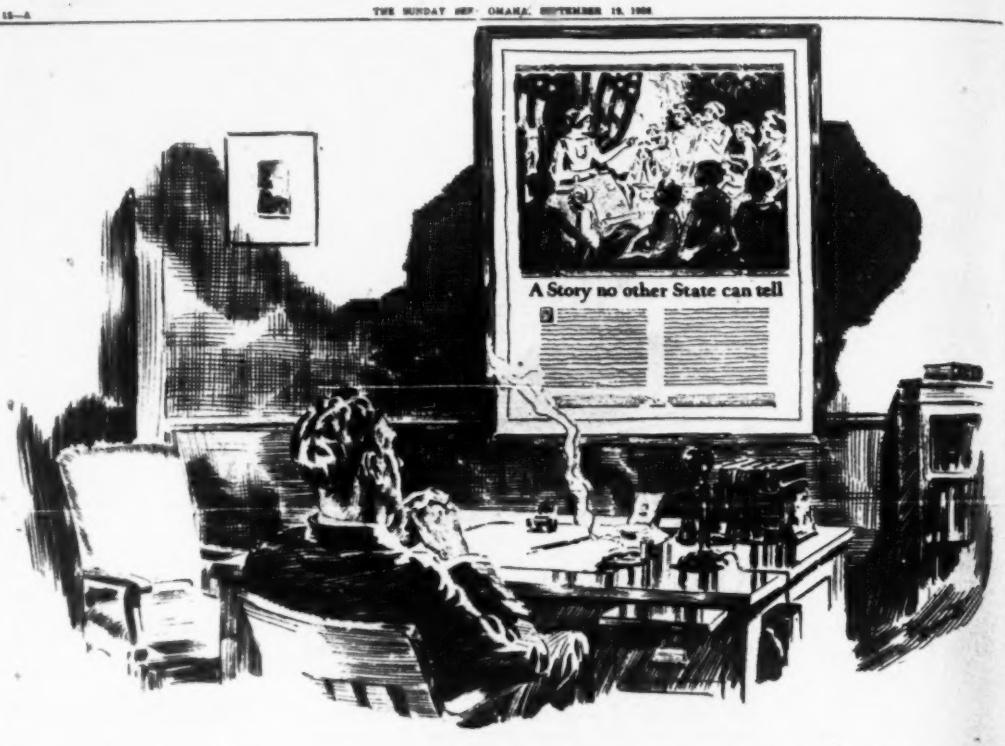

It has been a Wonderful Story

IT has been a wonderful story,---this story that no other state can tell. Strength and courage and loyalty to principle stand out in high light.

The people of Nebraska have felt the thrill of it. People in other states have been eager for its details.

A bank guarantee law under which the state banks in Nebraska are associated together to protect deposits.

War, inflation, visions of fabulous prosperity.

The war ended, deflation, losses on every hand and tumbling values.

Failed banks, deposits withdrawn, black clouds on the financial horizon, tell-tale marks of a panic.

State bankers standing shoulder to shoulder, working loyally under the Guarantee Law. Deposits in failed state banks all made good, depositors paid dollar for dollar; state bankers making good these losses out of profits, gritting their teeth, but seeing it through. Depression, but no panic in Nebraska; the black clouds roll away and reveal the sun.

Nebraska on the march again, the working capital of her people safe and doing the work of the state.

Greater wealth than ever before, $500,000,000 in products of the farm; $800,000,000 in the products of industry. Insurance on the men and materials of the state, life, fire and casualty of $5,000,000,000 paid for by annual premiums of $45,000,000.

The state banking system, that weathered and conquered the storm, stronger than before the deflation. Deposits of $[illegible],000,000, a new high peak in the history of the state banks in Nebraska.

Confidence of the people. Working together, building together—strong banks, a strong state—truly a wonderful story.

"A Story No Other State Can Tell"

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THE OMAHA BEE

The MEN who told e story that no other state can tell

THE men who told the story that no other state can tell are the men who control and operate the state banks in Nebraska. A group of these Nebraska state bankers felt that this story should be told to the people of the state and to the people of other states. They felt that such a record should be known to all, that there might come to Nebraska the benefits to which a strong financial foundation rightfully entitled her. They raised the funds, they laid out the plans and directed the writing of the chapters in this Nebraska story that has gripped the attention of the nation. The names of the banks which they control and operate are therefore here presented in bringing to a close the story that no other state can tell.

Abie, Neb.	Elmwood State Bank	Elmwood, Neb.	Farmers and Merchants Bank	Linwood, Neb.	State Bank of Papillion	Papillion, Neb.
Ainsworth, Neb.	The Home Bank	Elwood, Neb.	Lorn State Bank	Lorn, Neb.	Parks State Bank	Parks, Neb.
Allen, Neb.	Farmers State Bank	Emerson, Neb.	State Bank of Litchfield	Litchfield, Neb.	First State Bank	Pawnee City, Neb.
Alliance, Neb.	Farmers State Bank	Ericson, Neb.	Firs. State Bank	Lodgepole, Neb.	Commercial State Bank	Paxton, Neb.
Alliance, Neb.	Pioneer State Bank	Ewing, Neb.	Nebraska State Bank	Long Pine, Neb.	Farmers & Merchants State Bank	Pender, Neb.
Altona, Neb.	Ewing State Bank	Ewing, Neb.	Farmers State Bank	Lyman, Neb.	Pender State Bank	Pender, Neb.
Amherst, Neb.	The Citizens Bank	Fairfield, Neb.	Lorenta State Bank	Lorenta, Neb.	Petersburg State Bank	Petersburg, Neb.
Anoka, Neb.	Farmers and Merchants Bank	Fairfield, Neb.	Bank of Lorton	Lorton, Neb.	Pierce State Bank	Pierce, Neb.
Ansley, Neb.	Fordyce State Bank	Fordyce, Neb.	Loup City State Bank	Loup City, Neb.	Pilger State Bank	Pilger, Neb.
Arlington, Neb.	Fort Calhoun State Bank	Fort Calhoun, Neb.	Citizens State Bank	Lyons, Neb.	Security State Bank	Plainview, Neb.
Arnold, Neb.	Washington County State Bank	Fort Calhoun, Neb.	Bank of Lynch	Lynch, Neb.	Farmers State Bank	Platte Center, Neb.
Arnold, Neb.	Fremont State Bank	Fremont, Neb.	Farmers State Bank	Lynch, Neb.	Platte County Bank	Platte Center, Neb.
Ashton, Neb.	Friend State Bank	Friend, Neb.	McLean State Bank	McLean, Neb.	Plymouth State Bank	Plymouth, Neb.
Auburn, Neb.	Nortonville and Farmers Bank	Frend, Neb.	State Bank of Madison	Madison, Neb.	Farmers State Bank	Polk, Neb.
Auburn, Neb.	Farmers State Bank	Fullerton, Neb.	Madrid Exchange Bank	Madrid, Neb.	Exchange Bank	Ong, Neb.
Avoca, Neb.	Farmers and Merchants Bank	Gaslton, Neb.	Farmers State Bank	Marion, Neb.	Farmers State Bank	Powe, Neb.
Avoca, Neb.	Geneva State Bank	Geneva, Neb.	Saunders State Bank	Marsland, Neb.	Bank of Dixon County	Potter, Neb.
Bancroft, Neb.	Exchange Bank	Gibbon, Neb.	Maxwell State Bank	Maxwell, Neb.	Princeton State Bank	Princeton, Neb.
Bassett, Neb.	Commercial Bank	Gibbon, Neb.	State Bank of Maywood	Maywood, Neb.	Farmers State Bank	Ravenna, Neb.
Bassett, Neb.	Goodland State Bank	Goodland, Neb.	Security Bank	Meadow Grove, Neb.	Farmers & Merchants Bank	Randolph, Neb.
Battle Creek, Neb.	American Bank of Gordon	Gordon, Neb.	St. Clare State Bank	St. Clare, Neb.	Richland State Bank	Richland, Neb.
Battle Creek, Neb.	Gordon State Bank	Gordon, Neb.	Meadow Grove State Bank	Meadow Grove, Neb.	Farmers State Bank	Rising City, Neb.
Beattie Mills, Neb.	First State Bank	Gothenburg, Neb.	The Bank of Herna	Herna, Neb.	Rising City Bank	Rising City, Neb.
Beaver Crossing, Neb.	Farmers State Bank	Gothenburg, Neb.	The Anchor Bank	Hermman, Neb.	State Bank of Riverdale	Riverdale, Neb.
Benedict, Neb.	Gothenburg State Bank	Gothenburg, Neb.	The First Bank of Miller	Miller, Neb.	Bewley State Bank	Roseville, Neb.
Benson, Neb.	Commercial Bank of Grant	Grant, Neb.	State Bank of Hampton	Hampton, Neb.	Farmers State Bank	Rosalie, Neb.
Bertrand, Neb.	Greenwood State Bank	Greenwood, Neb.	Minden State Bank	Minden, Neb.	Rowland State Bank	Rowland, Neb.
Bethlehem, Neb.	The Farmers State Bank	Gurley, Neb.	Mitchell State Bank	Mitchell, Neb.	Rural State Bank	Rural, Neb.
Bethlehem, Neb.	Farmers State Bank	Hamlet, Neb.	The American Bank	Mitchell, Neb.	Union Bank	Rushville, Neb.
Bennington, Neb.	Hamilton County State Bank	Harvardburg, Neb.	Peters Valley State Bank	Monowi, Neb.	Farmers State Bank	Sarben, Neb.
Bennington, Neb.	Cedar County State Bank	Hartington, Neb.	Bank of Monroe	Monroe, Neb.	Farmers State Bank	Sargent, Neb.
Benson, Neb.	Union State Bank	Harvard, Neb.	Murray State Bank	Murray, Neb.	Sargent State Bank	Sargent, Neb.
Bethany, Neb.	State Bank of Hastings	Hastings, Neb.	First State Bank	Nacora, Neb.	Bank of Scotia	Scotia, Neb.
Bay Spring, Neb.	Farmers and Merchants Bank	Havelock, Neb.	Naponee State Bank	Naponee, Neb.	Farmers State Bank	Scotia, Neb.
Blair, Neb.	Farmers State Bank	Haward, Neb.	Security State Bank	Neligh, Neb.	Platte Valley State Bank	Scottsbluff, Neb.
Bloomfield, Neb.	Hartwell State Bank	Hartwell, Neb.	Exchange State Bank	Neligh, Neb.	American State Bank	Scottsbluff, Neb.
Bloomfield, Neb.	Bank of Henderson	Henderson, Neb.	Nemel State Bank	Nemel, Neb.	Scribner State Bank	Scribner, Neb.
Blue State Bank, Bloomfield, Neb.	Hastings State Bank	Hermon, Neb.	American State Bank	New Castle, Neb.	Farmers State Bank	Scribner, Neb.
Bloomington, Neb.	Nuckolls State Bank	Hildreth, Neb.	Exchange State Bank	New Castle, Neb.	State Bank of Nebraska	Seward, Neb.
Blue Springs, Neb.	Bank of Hubbell	Hubbell, Neb.	Farmers State Bank	Newport, Neb.	Shelby State Bank	Shelby, Neb.
Boelus, Neb.	Hardy State Bank	Hubbard, Neb.	Bach County State Bank	Newport, Neb.	Meixner's Bank	Silver, Neb.
Borlon, Neb.	State Bank	Holdrege, Neb.	State Bank of Wisherm	Nisherm, Neb.	The American Bank	Sidney, Neb.
Boone, Neb.	First State Bank	Hoskins, Neb.	The Nebraska State Bank	Norfolk, Neb.	Liberty State Bank	Sidney, Neb.
Bradish, Neb.	Farmers State Bank	Hemera, Neb.	Norman Exchange Bank	Norman, Neb.	Silver Creek State Bank	Silver Creek, Neb.
Brainard, Neb.	First State Bank	Hordville, Neb.	First State Bank	North Bend, Neb.	Snyder State Bank	Snyder, Neb.
Bridgeport, Neb.	The Bank of Howe	Howe, Neb.	Farmers State Bank	North Loup, Neb.	Bank of South Sioux City	South Sioux City, Neb.
Broadwater, Neb.	The Hemphill State Bank	Hemphill, Neb.	McDonald State Bank	North Platte, Neb.	Security State Bank	Spalding, Neb.
Brown, Neb.	Bank of Otis A. Murphy	Humphrey, Neb.	Platte Valley State Bank	North Platte, Neb.	Spencer State Bank	Spencer, Neb.
Bruno, Neb.	State Bank of Indianola	Indianola, Neb.	The Oakdale Bank	Oakdale, Neb.	Corn Exchange Bank	Spencer, Neb.
Brunswick, Neb.	Inman Pirie Bank	Inman, Neb.	Oakland State Bank	Oakland, Neb.	Blue Valley State Bank	Springranch, Neb.
Bury, Neb.	Jackson State Bank	Jackson, Neb.	Farmers State Bank	Ogallala, Neb.	Elkhorn Valley State Bank	Stanton, Neb.
Burton, Neb.	State Bank of Juniata	Juniata, Neb.	Nebraska State Bank	Okobois, Neb.	Farmers and Merchants Bank	Stanton, Neb.
Butte, Neb.	American State Bank	Kearney, Neb.	Commercial State Bank	Florence, Neb.	The First State Bank	Sterling, Neb.
Cairo, Neb.	Farmers State Bank	Kearney, Neb.	Bank of Bagley	Bagley, Neb.	Stockham State Bank	Stockham, Neb.
Cairo, Neb.	First State Bank	Kenesaw, Neb.	Farmers & Merchants Bank	Benson, Neb.	Farmers State Bank	St. Edwards, Neb.
Chadron, Neb.	Kenesaw State Bank	Kenesaw, Neb.	Security State Bank	Omaha, Neb.	St. Libory State Bank	St. Libory, Neb.
Chappell, Neb.	Farmers and Merchants Bank	Kennard, Neb.	The State Bank of Omaha	Omaha, Neb.	Farmers State Bank	Stromsburg, Neb.
Chappell, Neb.	Farmers State Bank	Kennard, Neb.	Union State Bank	Omaha, Neb.	Citizens Bank	Stuart, Neb.
Cheney, Neb.	Farmers State Bank	Kilgore, Neb.	Citizens State Bank	Orchard, Neb.	Farmers State Bank	Sun-l, Neb.
Chimney, Neb.	The Farmers State Bank	Kramer, Neb.	Farmers State Bank	Osceola, Neb.	Citizens State Bank	Superior, Neb.
Clarkson, Neb.	Lakeside State Bank	Lakeside, Neb.	Security State Bank	Osmond, Neb.	Surprise State Bank	Surprise, Neb.
Clearwater, Neb.	Lamar State Bank	Lamar, Neb.	Overton State Bank	Overton, Neb.	American State Bank	Sutherland, Neb.
Cody, Neb.	Leigh State Bank	Leigh, Neb.	Farmers State Bank	Overton, Neb.	Farmers State Bank	Sutherland, Neb.
Cody, Neb.	Farmers State Bank	Lewellen, Neb.	Bank of Oxford	Oxford, Neb.	Bank of Swanson	Swanton, Neb.
Cohoctah, Neb.	Liberty State Bank	Liberty, Neb.	Frenchman Valley Bank	Palisade, Neb.	Farmers Exchange Bank	Tamora, Neb.
Concord, Neb.	Continental State Bank	Lincoln, Neb.	Farmers State Bank	Panama, Neb.	Liberty State Bank	Thurston, Neb.
Concord, Neb.	Farmers State Bank	Lincoln, Neb.	Bank of Panama	Panama, Neb.	Bert County State Bank	Tekamah, Neb.
Cook, Neb.	Nebraska State Bank	Lincoln, Neb.			State Bank of Tilden	Tilden, Neb.
Cook, Neb.					Farmers Exchange Bank	Trumbull, Neb.
Cordova, Neb.					Farmers State Bank of Ulysses	Ulysses, Neb.
Creston, Neb.					Bank of Union	Union, Neb.
Critchfield, Neb.					Merchants Bank	Utica, Neb.
Craig, Neb.					Nebraska State Bank	Valentine, Neb.
Creighton, Neb.					Farmers State Bank	Valley, Neb.
Creston, Neb.					Venango State Bank	Venango, Neb.
Crofton, Neb.					Farmers State Bank	Venango, Neb.
Crookston, Neb.					Farmers State Bank	Verdel, Neb.
Curtis, Neb.					Knox County Bank	Verdigre, Neb.
Cushing, Neb.					Yanta State Bank	Yanta, Neb.
Dalton, Neb.					Farmers and Merchants Bank	Wahoo, Neb.
Dalton, Neb.					Security State Bank	Wakefield, Neb.
Dannebrog, Neb.					Farmers State Bank	Wallace, Neb.
Decatur, Neb.					Waterbury State Bank	Waterbury, Neb.
Dawson, Neb.					State Bank of Waterloo	Waterloo, Neb.
Dickens, Neb.					Peoples Bank	Wauneta, Neb.
Dixon, Neb.					Wauneta Falls Bank	Wauneta, Neb.
Dodge, Neb.					Lancaster County Bank	Waverly, Neb.
Dunbar, Neb.					State Bank of Wayne	Wayne, Neb.
Eagle, Neb.					Nebraska State Bank	Weeping Water, Neb.
Eagle, Neb.					Western State Bank	Western, Neb.
Edison, Neb.					Nebraska State Bank	West Point, Neb.
Edison, Neb.					State Bank	Wilsonville, Neb.
Culbertson, Neb.					Wisner State Bank	Wisner, Neb.
Elba, Neb.					State Bank	Wolbach, Neb.
Elba, Neb.					Peoples State Bank	Wolbach, Neb.
Eldorado, Neb.					Farmers State Bank	Wolbach, Neb.
Elgin, Neb.					Citizens State Bank	Wood Lake, Neb.
Elgin, Neb.					Wood Lake Bank	Wood Lake, Neb.
Elk, Neb.					Farmers and Merchants Bank	Wymore, Neb.
Elkhorn, Neb.					American State Bank	York, Neb.
Elkhorn, Neb.					Farmers State Bank	York, Neb.
Elmwood, Neb.						

1226 Q. You said R. G. Dunn and Company?

A. Yes.

[fol. 282] 1227 Q. State who they are?

A. A. R. Dunn is one of the largest merchantile agencies rating all business and manufacturing concerns in the country. Throughout that period from 1901 to 1917 I enjoyed confidential relations with all the banks in Nebraska. I was shown again and again their confidential files and records of their profits, as I would call on them during the year. From 1917 to the present time I have been in the banking business, operating a state bank from 1917 to 1923. During that period I have been a member of the Legislative Committee of the Nebraska Bankers Association, have been practically all the time the last ten years; served on Agriculture Loan Association, organized to do informally about the same as the Guarantee Fund has been doing, since 1923. I have been in the bank and of course, as city correspondent of country banks have tried to keep in touch with the banking situation.

1228 Q. What do you mean by city correspondent of country banks?

A. They carry a portion of their—We act as city correspondent for country banks; that means the country banks carry a portion of their reserve with us in the form of a deposit and from time to time the banks will borrow money from us.

1229 Q. What relationship has your connection with those banks brought you, with the correspondent banks?

A. Very close and confidential.

1230 Q. What is the nature of that relationship?

A. I would call on the bank and go through their note case and familiarize myself with their profits, losses, charge offs, expense, etc.

[fol. 283] 1231 Q. Now you referred to a legislative committee; with what organization is that a committee?

A. The Nebraska Bankers Association.

1232 Q. And you have been on that for over ten years?

A. Yes, sir.

1233 Q. Have you served on the Council of the State Bankers Association?

A. Yes.

1234 Q. What is the nature of that?

A. That is the equivalent of a Board of Directors of a corporation. They authorize expenditures, pay bills, and determine the general policies of the Nebraska Bankers Association.

1235 Q. What is your position now on the Legislative Committee?

A. I am still a member of the Legislative Committee.

1236 Q. Tell the court some of your activities as a member of the Legislative Committee?

A. Well with other members—we drew bills which were enacted into laws providing for the present Guarantee Fund Commission and for the reduction of the assessments on the State banks paid to the Guarantee Fund from 1.1% per annum to .6% per annum; did that in 1923. We also drew bills which were adopted providing for the licensing of state bankers by the Department of Trade and Commerce.

1237 Q. Did you appear before Legislative Committees?

A. Yes. We also—our Committee—drew a bill and had it introduced providing for discretionary powers on the part of the Department of Trade and Commerce on granting charters to banks. That was adopted in 1923.

1238 Q. As a member of the Legislative Committee and [fol. 284] the Council of the State Bankers Association and as Director of the State Agriculture Association to what extent did your activities bring you in touch with banking conditions in the state and your general banking experience?

A. Well, while I served with the Agriculture Loan Association we dealt with failed banks in practically the same manner as the Guarantee Fund dealt with them. With the consent of the various District Courts we issued receiver certificates which were endorsed and guaranteed by the Agriculture Loan Association then sold to solvent banks and the proceeds used to pay off depositors immediately. In fact, the only difference between what we did and what has been done since by the Guarantee Fund Commission was that it, the latter, was legalized by the law. This was more or less voluntary; no legal provision had been made for it. Stockholders were all voluntary stockholders and the Agriculture Loan Association assumed responsibility of endorsing receivers certificates and the banks who bought them assumed the responsibility of their being paid but the

depositors got their money and the object was to keep the Guarantee Fund from breaking down. The failures at that time, occurred so rapidly and with such large liabilities that the assessments were not bringing in enough money to pay the depositors.

1239 Q. As a member of this Legislative Committee and as a member of the Council of the State Bankers Association and as Director of the State Agriculture Association and as cashier of the Lincoln State Bank, which had on deposit money of various country banks, did you become familiar with banking conditions generally in Nebraska during the last ten years?

A. Yes.

[fol. 285] 1240 Q. From your knowledge and experience are you able to state what were the general banking conditions from 1910 to July 1, 1928?

A. Yes.

1241 Q. Do you know the cause, generally, of bank failures during that period?

Mr. Flansburg: That is objected to as no foundation has been laid.

The Court: He may answer.

Exception.

A. Yes.

1242 Q. Do you know the amount, the general extent and the cause of the charge offs by banks during that period?

A. Yes.

1243 Q. Do you know the financial condition of the banks of the state during that period and the reasons for the conditions that existed in the state banks during that period?

A. Yes.

1244 Q. You may tell the Court what was the banking situation in Nebraska during the period 1910 to 1920?

Mr. Flansburg; Object to that as no foundation laid and calling for conclusion and hearsay testimony. No showing has been made that this witness knows the individual condition of any single bank.

The Court: Overruled.

Exception.

A. During that period in question practically every bank in the state, in fact all within my knowledge and there were not very many I did not know about, made money. The bank deposits increased from year to year. There were, with few exceptions, almost no losses charged off be-
[fol. 286] cause during that particular period the price of land was increasing steadily up until the period of about 1915 and 1916. From 1915 and 1916 it increased by wild leaps. Loans were made on the thin-est real estate equities but during that entire period an equity in land in Nebraska could be cashed in on as readily as Liberty Bond could be since 1920. The result was that bankers loaned freely on real estate equities and on, you might call them character loans, made against the ability of the borrower to earn the money after the loan was made so that for that period a loan credit or banking credit was not only free, it was aggressive. Bankers had so much money to loan that it was common throughout many parts of Nebraska for bankers to go to men who were not customers of their bank and ask them to borrow money to buy land or to go into some business.

1245 Q. What about in 1920?

Mr. Flansburg: I move to strike out that portion of the answer saying it was customary for bankers to go out and ask people to borrow.

The Court: Overruled.

Exception.

A. There came a crash and crisis; live stock dropped more than fifty per cent in just a few weeks time. Cattle and hogs fell off more than fifty per cent. Corn dropped in price from $1.60 and $1.75 to about 20¢; wheat dropped from something about $2.00, there was a variation according to the location, as to freight, etc., to a fraction, about 60¢.

1246 Q. You have stated the banking situation during the period from 1910 to 1920. Now state the situation from July of 1920 to July 1, 1928?

[fol. 287] A. Following the drop in prices which I have just suggested many borrowers, who were depending on the sale of live stock and grain to take up their indebtedness were unable to pay and the fall in these prices very quickly

had its effect on land prices, although with regard to real estate mortgages that did not become evidence until later,—that is to say it didn't become acute till later. During the year 1919 many mortgages were written up, the loans made for five years and a good many borrowers didn't begin to meet with foreclosures until some little time after the interest had accumulated. But undoubtedly this crash in prices, this period of deflation caused some, many, bank failures which would not otherwise have occurred and increased and enlarged the losses of other banks which would have failed anyway. It should be borne in mind that there would have been a large number of bank failures in Nebraska even if there had been no fall in prices because of the recklessness in making loans to begin new business ventures, but this crash greatly increased the losses and exaggerated their effect.

1247 Q. Did this situation force banks to charge off a lot of paper from 1920 to 1928?

A. Yes.

1248 Q. Can you tell the amount of those charge offs and the general extent during that period?

Mr. Flansburg: I do not know that the witness is qualified to estimate that, that would be purely speculative.

The Court: He may answer if he knows.

Mr. Sorenson: I withdraw the question.

1249 Q. You testified concerning the crash in 1920. What [fol. 288] were the tendencies as to land values and other values from 1920 to July 1, 1928?

A. Of course, there are individual exceptions but real estate has made little if any recovery up to date. The difficulty in general is this, that if you have a specific farm and you ask for an appraisal of it, after you have it appraised by an expert in real estate, one who will give you an appraisal just as before 1920, that has no relation as to what it would bring if it were put up for sale. Formerly you could go from one end of Nebraska to another and have a farm appraised by a competent person and sell it for within five or ten dollars an acre of the valuation. Since that time, no matter how carefully an expert will estimate a farm's value the owner or mortgagee cannot determine what the farm will bring and that, of course is the basis of

one of the bank problems for the last seven or eight years, realizing on real estate.

1250 Q. You stated that loans and mortgages executed in 1919 became due later. What effect did they have on land values and bank conditions from July 1920 to July 1, 1928?

A. The foreclosures,—I looked up the court records in several counties and I think they would bear me out in this, increased for 1924 and on up to 1927 as the mortgages kept coming due and delinquent. I have checked a few counties and the records will show, I think, that the number of foreclosures were much larger in number during these years than in the years following the crash in prices.

1251 Q. What was the effect of the foreclosure on the banks?

A. It forced the banks to increase steadily the item of "other real estate" in their statements. Banks were com- [fol. 289] pelled to take over real estate it didn't want and the consolidated financial statement of the Nebraska Banks shows that the item "other real estate" has steadily increased since 1920.

1252 Q. You have testified concerning conditions that affected real estate and other values; what effect did those conditions have on the banks during this period?

A. Are you speaking from 1920 to July 1, 1928?

1253 Q. Yes, as to the cause of failures and approximate losses?

A. Well, it was the last and final cause and the occasion of the greatest number of bank failures the state has ever suffered from. There were other contributing causes, such as individual incompetency and occasionally a betrayal of trust, but those were trivial as compared to the other conditions which caused nearly three hundred banks to fail in Nebraska.

1254 Q. In your opinion, then, the failure of banks during that period were largely accused by the general economic situation existing at that time?

A. Yes, largely.

1255 Q. You spoke about other contributing causes; tell the Court about the majority of those.

A. If I may give illustrations,—

1256 Q. Yes, you may illustrate.

A. If I may make my answer by some facts which will

serve to illustrate; an observer may go into any part of Nebraska, where the bank failures have been most numerous and he will find in the same town or in the same county, with the same economic conditions, a perfectly sound bank that has come through all this period with losses so relatively small the earnings were sufficient to absorb them leaving the capital and surplus wholly unimpaired and also [fol. 290] permitting a number of banks to continue paying dividends. That illustration can be repeated all over the State of Nebraska, go out into any of the counties, towards Wyoming or Colorado or in the northeast part of the state where failures have been most numerous and you will find amoung all those failures not a few but many banks that have come through it all.

1257 Q. What is the explanation?

A. It is competent management on the part of the banks that survived and that economic conditions alone are not sufficient to account for all these failures and I think it also proves my statement that there would have been many failures in Nebraska if there had been no substantial crash in prices.

1258 Q. As I understand it, your statement is that in the main the failures of banks were due to financial depression after the war, is that true?

A. That is the large cause and it accounts for the degree of the losses, that is it was accentuted by economic conditions.

1259 Q. What would you say as to too many banks in any one community, or in any one county in Nebraska?

A. Well, that is another contributing factor closely related to incompetency on the part of some and especially the form of incompetency where it becomes obvious there are too many banks and repeated efforts on the part of the Department of Trade and Commerce to effect a consolidation have failed to succeed; but taking conditions as they were there is no doubt but what the large number of banks in Nebraska was another contributing factor, especially in certain towns. Of course, it should be observed that while Nebraska had one bank for about every twelve hundred people as compared with the State of New York with one bank for about every five thousand, that this exce- of banks [fol. 291] was not uniformly distributed. Many towns in

Nebraska did not have too many banks. Towns that might have supported one bank had two and three and in some places, where two banks might have lived there were three and five, so that in certain localities the excessive number of banks might have been the biggest factor in failures but the distribution of that was quite uneven throughout Nebraska, some counties not having been over-banked and others being excessively over-supplied with banks.

1260 Q. In your opinion, were the Guaranty Fund assessments made from July, 1920 to July 1, 1928, materially contributing factors in causing those banks to fail?

A. I think that might have been up to 1923 when the rate of assessment was 1.1%. That meant, when translated into ratio to capital stock, an average of about fifteen to twenty per cent as most banks in those days had about fifteen to twenty times the amount of their capital stock in deposits, many of them would, and that made an excessively high rate up to 1923.

1261 Q. What effect, in your opinion, have the Bank Guaranty Fund assessments had on the banking situation in Nebraska since 1923 to July 1, 1928?

A. Well, depends on how you start to analyze and how many related facts you take in.

1262 Q. Has it been beneficial or otherwise?

Mr. Flansburg: Object to the question as calling for conclusion of the witness.

Mr. Sorenson: I withdraw the question.

1263 Q. In your opinion, Mr. Woods, has the Guaranty Fund assessments of .6% from 1923 to July 1, 1928, been a [fol. 292] materially contributing factor in the failure of banks during that period?

A. I think not.

1264 Q. What influence, in your opinion, has the Guaranty Fund and the assessments collected under that law had on the banking situation from 1920 to 1928, on deposits?

Mr. Flansburg: Object to the question as calling for conclusion.

The Court: He may answer.

Exception.

A. It has had a steadying influence on the deposits of every state bank in Nebraska and it has resulted in a steady and material increase of the deposits of those banks which were advantageously situated with respect to competition.

1265 Q. Now, Mr. Woods, you state that the Bank Guaranty Law had an influence on deposits; in your opinion what effect, if any, has the Guaranty Fund Law and its operation had on the amount of money deposited in state banks? From 1910 up to July 1, 1928?

Mr. Flansburg: Object to the question as calling for conclusion of the witness.

The Court: He may answer.

Exception.

A. It is no exaggeration to say it has accounted for at least one hundred million dollars deposited in the state banks of Nebraska which would not otherwise have been made except for the Bank Guaranty Law. I do not think there is any exaggeration in that statement at all.

1266 Q. Now what effect, within your knowledge, has the Guaranty Fund Law had on the competition for deposits between National Banks and State Banks from 1910 to July 1, 1928?

[fol. 293] Mr. Flansburg: Object to the question as calling for conclusion of the witness.

The Court: He may answer.

Exception.

1267 Q. Just generally?

A. I know from first hand knowledge that depositors who have changed their location to other places and made inquiry with regard to banks have met the banker with this question, "Are deposits in this bank guaranteed by the State of Nebraska?" and if they were told "No" that particular bank didn't get the deposit. That has been commonplace in the last six or seven years all over Nebraska.

1268 Q. Did that situation exist up to July 1, 1928? Has it up until sometime in 1928?

A. I don't think it is so true right now.

1269 Q. What was the general situation as to the financial condition of the state banks in 1923?

Mr. Gaines: Object to that as to indefinite.
The Court: I rather think so. Objection sustained.

Exception.

1270 Q. What was the relative financial condition of the state banks in Nebraska as of July 1, 1928 as compared with previous years since 1923?

Mr. Flansburg: Object to the question as calling for comparison.

1271 Q. Not figures, just generally?

The Court: He may answer. Overruled.

Exception.

A. Well, if I may supply my own data for comparison, I think maybe I could answer,—I don't know how to answer it.

Mr. Flansburg: I renew former objection and further [fol. 294] object as witness does not understand what attorney is asking for and has to supply his own data.
The Court: Overruled.

Exception.

A. If I understand the question I would say that comparing the ability of the state banks of Nebraska on the whole now to pay depositors upon demand, to meet expense of any kind and to make earnings and pay dividends that the situation in 1928 is vastly improved over 1923. In every respect, without any exception their condition is incomparably better than in 1923.

Mr. Flansburg: I move to strike the answer as speculative, and not based on any fact.
The Court: Overruled.

Exception.

1272 Q. Are conditions now incomparably better than in 1920?

Mr. Flansburg: I offer the same objection.
The Court: He may answer.

Exception.

Mr. Sorenson: I withdraw the question.

1273 Q. You have testified as to the comparison between the situation as of July 1, 1928 and 1923?

A. Yes.

1274 Q. Would you make the same comparison for the succeeding years?

A. The degree would go down because there has been more or less steady improvement since 1923. Let me make it plain, I am talking about surviving banks. There have been bank failures and there may be more, because of conditions or what not, but surviving banks have been improving their conditions and are now better able to meet all [fol. 295] obligations of whatever nature than they have been at any time since 1923.

1275 Q. In other words, there has been a steady improvement from 1923 up to 1928?

A. That is my judgment.

It now being four thirty o'clock p. m. adjournment was taken until ten o'clock a. m., Monday, February 4, 1929, at which time the following proceedings were done and had, to wit:

[fol. 296] Monday, February 4, 1929, ten o'clock A. M., Court convened and trial resumed pursuant to adjournment.

Mr. Geo. W. Woods, a witness heretofore called and duly sworn on behalf of the defendants, resumed the stand and testified as follows:

Cross-examination.

By Mr. Gaines:

1276 Q. Mr. Woods, I didn't understand, how long have you been connected with your present bank?

A. Since 1917.

1277 Q. How long since it was organized as a state bank?

A. Started business in 1913.

1278 Q. That is before your connection with it?

A. Yes, I have been connected with it only since January, 1917.

1279 Q. And when did you nationalize?

A. 1923.

1280 Q. What date?

A. The very last of March, about the 31st of March, 1923, very close to that date, that is, within two or three days.

1281 Q. Your object in nationalizing was to get rid of the guarantee Fund assessments?

Mr. Abbott: That is objected to as not proper cross examination, and calling for conclusion of the witness and not for facts.

The Court: Overruled.

Exception.

[fol. 297] 1282 Q. Why did you change from a State to a National Bank?

A. We had several reasons for changing. One was that we found we were inadequately capitalized in relation to the aggregate deposits. Our group, the group that owns our bank, are very conservative. They feel that a bank should have at the risk of the bank stockholder's money to the extent of about one-tenth of the deposits. At that time our capital stock was only one-twentieth of our deposits so we felt that we should really have a larger capitalization, and decide to double our capital stock to give us greater security. While we had been a state bank for five years and had benefited in the growth of the deposits due to the Guaranty Law, that our officers felt was due to the Guaranty Fund, it irked us because people might be doing business with us, not because they had confidence in our group—we desired to stand strictly on our own feet and to have our customers do business with us because they had confidence in our bank, in the quality of the bank, in the capabilities of the bank. It was irksome to us to feel we might have customers who didn't take the trouble to investigate the kind of bank we were and who were acting on the theory we were good because of some external reason, that was one motive. Another was that through the activities of two of the officers we were quite familiar, at least as familiar as we could make ourselves at that time, with the

situation in Nebraska and we didn't have confidence that the law would succeed in the way it was originally intended [fol. 298] and we preferred, if we made a change at all, to make it at that time so that our action in nationalizing would not injure other state banks. The facts are that two large state banks had asked us to join with them and nationalize and we declined to do that and said if we did nationalize we would take the entire result upon ourselves, —get a line of depositors who believe in our bank and thought it safe to do business. At that time the maximum assessments were 1.1% of the average daily deposits. In pursuance of our policy, attempting to run a sound and conservative bank, we had been carrying a very large part of our assets in high grade, low interest bearing bonds which reduced our gross earnings. We could have made more money, had a bigger gross income, by putting all our money in loans. We also might have increased our losses. But in any event, wishing to adhere to the policy of conducting a very conservative bank, one that we could liquidate under any circumstances that were likely to occur, we decided we would rather nationalize where we would be free to carry out that policy than to continue as a State Bank and operate less conservatively in order to pay that big assessment.

1283 Q. Did the fact that these so called special assessments, that it was apparent to you they could continue for some length of time, influence you in changing from a State Bank to a National at that time?

A. Yes——(interrupted)

[fol. 299] Mr. Abbott: Object to that as not proper cross examination.

The Court: Overruled.

Exception.

A. (continued). —that is, was one of the considerations.

1284 Q. This assessment of 1.1% that you speak about, had the law been changed at that time to become operative the last of June of that year?

A. No, that was being fought over in the Legislature at that time.

1285 Q. Had the Bill passed?

A. The Bill had not passed and we were told the Governor would veto the Bill. As a matter of fact, he never did sign it but allowed it to become a law by pocket veto.

1286 Q. Would you have nationalized in either event?

Mr. Abbott: I object to that as not proper cross examination.

The Court: Sustained.

Exception.

1287 Q. Had you decided to nationalize in either event?

Mr. Abbott: I object to the question as not proper cross examination.

The Court: Overruled.

Exception.

A. Well, I don't know as I have a right to try to speak the minds of the other members of our Board of Directors. I can throw some light on the matter by a discussion between some of our officers with the officers of other banks at the time.

1288 Q. I don't care for that discussion. I just asked, Had you determined to nationalize at that time even though [fol. 300] the law should be changed as to the 1.1% and did not you so state to Mr. Flansburg on Saturday?

A. Well, what time do you mean? You mean the date we secured the charter?

Mr. Abbott: Object to this as not proper cross examination.

The Court: Overruled.

Exception.

A. Well, that is a little different than your first question.

1289 Q. Answer this one.

A. I would say that to the specific question you asked first, Certainly not.

1290 Q. That answer is not responsive.

A. The Bank——(interrupted)

Mr. Campbell: I object to that as being a double question.

1291 Q. I withdraw the statement as to Mr. Flansburg.

A. We had made the decision to nationalize months in advance of that time and there was never any discussion came up. I have no way of knowing what, if any, change would have taken place in the minds of our people if the law had been adopted sooner but we decided to nationalize back in December and I went ahead and nationalized but I can't answer what we would have done if we had looked into the future, because that wasn't discussed.

1292 Q. You stated this Bank Guaranty Law had added, conservatively speaking, one hundred million to the deposits in the state banks?

[fol. 301] A. Yes, I said that.

1293 Q. Have you any data from books as a basis for that opinion or is that just your guess.

A. That is my guess. I could give you some data, yes.

1294 Q. Do you know what the deposits increased in Iowa during the same period?

A. No.

1295 Q. What were the deposits in your bank at the time you nationalized, approximately?

Mr. Sorenson: I object to that as not proper cross examination, incompetent and irrelevant.

The Court: Overruled.

Exception.

A. I would have to refer to our books to know exactly what the deposits were of that date. If you want the Average deposits——

1296 Q. Average deposits?

A. Two million dollars.

1297 Q. And what was your average deposits at your last published statement?

A. We don't publish the average——

1298 Q. What was your deposits at your last published statement?

A. Two and a half millions and I should add that is an unfair comparison; now the deposits in 1923 sometimes ran up to two and a half millions because of temporary settlements. A bank of our size fluctuates frequently a half a million dollars within a few days. If I might be permitted

I would like to correct my testimony in regard to having data that bears on the one hundred million dollars. You [fol. 302] asked if I had any data and I just thought of some.

1299 Q: No never mind about that. Does that same principal apply to your deposits during 1928, fluctuating a half a million?

A. Our deposits fluctuated more than half a million during 1928.

1300 Q. And at times they reached as high as three million in 1928?

A. Not quite.

1301 Q. As a matter of fact, your deposits were approximately five hundred thousand dollars more in 1928 as a National Bank than they were in 1923?

A. No, they wouldn't average that.

1302 Q. What would they average?

A. Two or three hundred thousand, approximately.

1303 Q. Do you know the bank known as the Nebraska State Bank?

A. Yes.

1304 Q. You have studied the banking situation?

A. Yes.

1305 Q. Were its deposits in 1923 at the time you nationalized approximately the same as yours?

A. I can't recall; I can't keep all these figures in my mind, I would have to see a statement.

1306 Q. Do you read as they come out the report of the conditions of the banks in this city?

A. Yes, I do.

1307 Q. I hand you a paper marked Exhibit 14 and ask you if that is a report of your bank as of December 31, 1925, and published by you?

A. December 31, 1924, that is a statement of our bank on December 31, 1924.

1308 Q. And what were the amount of your deposits as of that date?

[fol. 303] A. $2,575,000.

1309 Q. I show you the paper marked Exhibit 15 and ask you if you read that statement when it was published, being a report of the Nebraska State Bank as of the same date, December 31, 1924?

Mr. Abbott: I object to that as not proper cross examination and no sufficient foundation laid.

The Court: He may answer.

Exception.

A. I undoubtedly did, I read such statements.

1310 Q. That is one of the statements published in the Lincoln newspapers of that date?

A. Yes, it evidently is.

1311 Q. What was the amount of the deposits in that bank?

Mr. Abbott: Objected to as not proper cross examination laid, immaterial and no foundation laid.

The Court: Overruled; he may answer if he knows.

Exception.

By Mr. Gaines: I asked the defendant, Mr. Bliss, to produce the original of Exhibit No. 15, being a published report of the Nebraska State Bank as of December 31, 1924, being the report on file in his office and I also ask him to produce the original of the report of the same bank as of December 31, 1928, and you may have the exhibit for the purpose of obtaining the original for the dates I have given you.

By Mr. Abbott: I object to this demand on the ground that the bank whose statement they are asking us to produce [fol. 304] is a party plaintiff to this suit and they have the statement themselves and they can call the officers of this bank and have them swear as to what the deposits were at that time.

The Court: Overruled.

Exception.

1312 Q. Now, Mr. Woods, when you stated that in your opinion the Guaranty Law had added a hundred millions to deposits in state banks, did you mean that otherwise those deposits would have been in National Banks or in Building and Loan Companies?

A. Yes, and other investments; they would have been either in national banks, or building and loans or stocks.

1313 Q. I will go back to our illustration of State and National banks. Can you give me the names of ten towns

in this state where National banks and State banks are competing for business, in which the deposits in state banks exceed those in national banks?

A. I certainly can if you will give me time.

1314 Q. Where there are two banks, national and state, in the same town or city in which the deposits in state banks exceed those in the national banks?

A. Of course, in many instances the national banks gave up the fight and de-nationalized. Now, I would like to ask Mr. Gaines the interpretation of his question. The town of Norfolk has one state bank which has more deposits than all the national banks put together. Nebraska City has one [fol. 305] state bank which has more deposits than any national bank in the town but not more than all put together. Do you want to exclude Nebraska City?

1315 Q. No, sir. My question is this: any town you wish to select, take all the banks, state banks, in that town or city, take all the national banks in that town or city and in which class of banks is the deposits greater?

A. I am not sure I can give you those, that is a different question.

1316 Q. You have given the town of Norfolk and I could give you one other town and I want you to give ten, in which the combined deposits in state banks exceed the combined deposits of the national banks of that city, or town. That was my first question.

A. I don't think I could give you ten towns on that basis.

1317 Q. It is a fact, then, isn't it, that in over 90% of the cities and towns of this state in which there is a national bank or banks and state banks that deposits in national banks exceed the deposits in the state banks?

Mr. Abbott: I object to that as immaterial and irrelevant.

The Court: Overruled.

Exception.

A. I can't answer. I have never made that tabulation. I know in a general way that the national banks have been confined very largely to the larger towns and cities where the effect of the guaranty fund has not been—the influence of the guaranty fund has not been so effective in the larger cities as in the smaller cities but I haven't made the tabulation you refer to so I can't answer.

[fol. 306] 1318 Q. Now then, can you state as an opinion, that the deposits in the state banks have been increased approximately one hundred million in this state because of the guaranty fund when you haven't attempted to make any comparison between the deposits in state banks and deposits in national banks in this state in the towns where the two exist?

Mr. Abbott: I object to this as not reflecting the testimony of the witness.

The Court: Overruled. He may answer.

Exception.

A. I did not say what you said I said. I said I had not made the particular tabulation you referred to. I have made studies of the increase of deposits in state banks, perfectly marvelous growth, in places where there were splendid state banks, Hastings for example and I have studied the general trend of the national banks in de-nationalizing, in going over to the state banks where, of course they could benefit by that, and I have also made studies of the individual deposits in state banks in Nebraska where from first hand knowledge I know that excessively large deposits were made in lieu of other investments because more confidence was felt; they were considered just as good as government bonds and paid more interest. This is taking all the comparisons I have made up to a year ago, I couldn't say the exact date because this has been true generally under the law.

1319 Q. What large bank has de-nationalized since the creation of this special assessment, since 1921?

[fol. 307] A. John Flannigan, a well known banker de-nationalized within three years. Phil Hall de-nationalized at Greenwood within the last three years, both on account of the guaranty fund.

1320 Q. Just the two you have mentioned?

A. I would have to refresh my memory to get more than that, those occur to me just immediately.

1321 Q. I understood you to state that the year 1928 from a financial standpoint had been a very favorable year to the banking situation.

A. I didn't say anything that remotely resembled that. I wasn't talking about 1928 as a year within itself. I was making a comparison of state banks in 1928 and 1923 and set up my own data for comparison.

1322 Q. Is the year 1928 considered a good year from the standpoint of profits as compared with 1923?

A. That couldn't be answered without an explanation. In 1923 a lot of banks were broke and hadn't discovered it yet and set up profits that shouldn't have been set up. In other words, their books didn't reflect the true condition of the banks in 1923. In 1928 most of the banks knew more nearly the exact facts with regard to their note cases and if you take into account operating profit 1928 was not a bad year. I understand only about thirty banks failed to make an operating profit in 1928. But of course, a great many had old losses which they charged off but these were hang-overs from former years.

1323 Q. Book losses that occurred prior to 1923 but had not developed until later?

A. That is true in a large way but we have had all sorts [fol. 308] of local conditions in the last few years. In 1926 large sections had almost a total crop failure. There must have been more than a third of the counties that had almost a total crop failure and that set up new losses.

1324 Q. These conditions that you speak of, of deflation that culminated in 1923, were they general throughout the agricultural sections of the United States and the west?

A. Yes, those conditions were general.

1325 Q. Are you familiar with the American Bankers Association, do you get its reports?

A. I don't know which ones you have in mind, which specific reports you have in mind.

1326 Q. Have you the report of 1927 of the American Bankers, published in June, 1928?

A. You are talking about their publication, a monthly magazine? Well I glance through that.

1327 Q. Have you a publication showing the condition for the year ending June 30, 1928, do you have the publication?

A. I don't recall what you are referring to, if you will make it more definite, I see the monthly Journal of the American Bankers Association and sometimes read it.

1328 Q. I have a report here of the New York Times——

Mr. Abbott: We object to the reading in evidence of the report of the New York Times as not proper cross-examination and not affording basis for cross-examination.

The Court: Overruled.

Exception.

1329 Q. (Continuing:)—showing a decrease in bank [fol. 309] failures in two sections for the year ending January 30, 1928 to a degree that cut the comparative figures in 1927 almost in half and gives the lowest total since 1923, are shown in a tabulation issued here today by the state bank division of the American Bankers Association. Have you see- that compilation?

A. I don't recall it. If it appeared in the Journal of the American Bankers Association I undoubtedly saw it but I didn't memorize it but I have seen similar statements to that and I had that impression.

1330 Q. Are they reliable as to what their figures show there?

A. They are surely pretty reliable if this is a compilation of material from the American Bankers Association, it is surely reliable.

1331 Q. If that report should show that in all of the states with the exception of Nebraska there was a decrease in bank failures for the period ending Jan. 30, 1928, and in Nebraska there was an increase in bank failures, would that have anything to do with your opinion?

Mr. Abbott: Object to this as not proper cross-examination.

The Court: Overruled.

Exception.

A. It has no significance and I would like to explain why.

1332 Q. I will ask you to confine yourself to the questions that I ask. Was South Dakota, in your knowledge, one of the states that had a so-called bank guaranty fund?

A. Yes.

1333 Q. Suppose that this report should show that the failures in South Dakota dropped from 47 for the period [fol. 310] ending June 30, 1927 to ten for the period ending June 30, 1928; would that have any significance in your opinion, as to the guaranty fund?

A. It has significance for South Dakota but not as to Nebraska. None as regards Nebraska. There is a local condition in Nebraska which explains the condition in Nebraska and this local condition is not true in any other state.

1334 Q. Do you know whether Texas has a so called guaranty fund?

A. Yes.

1335 Q. Do they?

A. They did have.

1336 Q. Suppose, I will change that, If this report should show that after the abandonment of the guaranty fund that the failures in Texas for the period ending June 30, 1927, as compared with the figures for the period ending June 30, 1928, that the failures in state banks dropped in 1928 would that have any significance in your opinion, as to the guaranty law?

Mr. Abbott: Objected to as not proper cross-examination.
The Court: Ovverruled.

Exception.

A. My answer is the same. Conditions in Texas are not analagous to those in Nebraska: there is a local condition here.

1337 Q. In the face of the fact that it is now generally known that there is a probable deficit in the guaranty fund you give as your opinion that now the guaranty fund attracts depositors to the state banks and is of any benefit to them whatever? As of July 1, 1928?

[fol. 311] Mr. Abbott: I object to that as not cross-examination, not proper cross examination.
The Court: Overruled.

Exception.

Mr. Abbott: Not proper cross-examination as to now.
The Court: Overruled.

Exception.

A. I know of a specific instance in a city of Nebraska since July 1, 1928, where a new corporation was organized and several banks solicited the account and the account was placed in a state bank because the organizer of that cor-

poration still believed that the State of Nebraska guaranteed its deposits.

1338 Q. I am asking you to give your opinion in answer to the question.

A. Well, if I have got to express my opinion—it isn't fair to state because the conditions of the Nebraska guaranty fund are not known yet and hardly known at all in July, 1928.

1339 Q. If the conditions were well known, then what would be your opinion, in July, 1928?

Mr. Abbott: Objected to as speculative, and not proper cross-examination.

The Court: He may answer.

Exception.

A. I don't know what the conditions are myself, right now, in the minds of the people of Nebraska. If your question means if everybody in Nebraska knew that the guaranty fund was in arrears and had no cash to pay and at the same time thought that the state would not make it up, of course it would have an influence on the benefits of the guaranty fund law, to the bankers, if all those conditions were true but I can't answer if all these conditions are true.

Cross-examination continued.

By Mr. Flansburg:

[fol. 312] 1340 Q. When was the first general publication made in the newspapers that the Guaranty Fund was insolvent? How early in 1928?

Mr. Abbott: I object to the form of the question. It infers the Guaranty Fund is insolvent.

The Court: He may answer.

Exception.

A. I don't remember, if you put it into that language.

1341 Q. When were the facts published that it was apparent that the Guaranty Fund was insolvent?

Mr. Abbott: I object to the question; it assumes the publication of facts that the Guaranty Fund is insolvent.

The Court: Overruled.

Exception.

A. I have seen various, I don't know what the country newspapers did but the larger newspapers did not carry the whole story until the latter part of 1928, that is, it was after the Legislative Committee of the Nebraska Bankers Association furnished, rather assembled data based on reports from the Guaranty Fund Commission and the——

1342 Q. What did those reports show?

A. They gave just the facts without any interpretation.

1343 Q. Now, what was the general information given in those reports?

Mr. Abbott: I object to that as incompetent, immaterial and irrelevant, not proper cross examination and not the best evidence.

The Court: He may answer.

Exception.

A. It just took the——

1344 Q. That report wasn't published?

A. It has been published, or I think it has been published [fol. 313] in Nebraska.

1345 Q. Did the publication show the deficit in the Guaranty Fund, the amount of it?

A. Yes.

1346 Q. And how early was that publication made in 1928, by July?

A. No.

1347 Q. About July?

A. Well, quite a while since.

1348 Q. How long since?

A. I think the first newspaper to carry the gist of that data was the Nebraska Farmer.

1349 Q. That is a paper of wide circulation?

A. Yes.

1350 Q. And it showed there was a deficit in the Guaranty Fund of how many million?

A. I don't remember how he worded it.

1351 Q. Approximately how many millions?

A. I would have to—My memory is he worded it about as showing there were ten million of a-judicated claims and fifteen million more, making a total of twenty-five million altogether.

1352 Q. And the deficit in the fund, after proper apportionment of the assets of about fifteen millions?

A. That was indefinite; some officers said ten million and some fifteen.

1353 Q. That was generally and widely published throughout Nebraska in the latter part of 1928?

A. Yes. I can't give the exact date, I didn't put my memory to it. I may be mistaken but it seems the first time [fol. 314] I saw the account was in the Nebraska Farmer and later of course the figures were given in the Star and Journal and both Omaha Papers carried the same figures.

1354 Q. After that information was widely published, Mr. Woods, did the Guaranty Fund then offer inducements to depositors which would persuade them to make deposits in state banks?

A. I can't answer that.

1355 Q. Just answer "Yes" or "No."

A. I can't answer that, you are asking me to say what effect that had on other minds.

1356 Q. I will ask you for your opinion, as to whether or not it then was any inducement to depositors to deposit money in state banks?

A. To those citizens who were capable of understanding, it didn't.

1357 Q. That was the general situation throughout the state as to depositors, isn't that so?

A. You mean that the general public who had money to deposit were able to read this and take that view? I can't answer that.

1358 Q. In your opinion, didn't the benefit of the Guaranty Fund cease when this information was widely published throughout the state? If there was any such benefit?

Mr. Abbott: I object to that as not proper cross examination and calling for conclusion of the witness.

The Court: Overruled.

Exception.

A. It certainly did in the minds of the state bankers themselves.

[fol. 315] 1359 Q. And it certainly did in the minds of the depositors.

A. It did in the minds of the depositors who were sufficiently alert to understand and analyze it.

1360 Q. Now Mr. Woods, didn't you give me as your opinion the other day that after this information had been

published that the bankers from that time forth got no benefit from the Guaranty Fund?

A. I said that is the way they felt about it.

1361 Q. That is the way you felt about it, wasn't it?

A. I don't remember; I expressed my own opinion only; I didn't criticize the bankers.

1362 Q. Didn't you give your opinion to me and don't you now hold the opinion that from that time the Guaranty Fund has offered no benefits to the state banks?

A. No, that is too sweeping.

1363 Q. Does the continuation of the Guaranty Fund assessments strengthen the state banking system or weaken it, in your opinion?

Mr. Abbott: Object to that as not proper cross examination and calling for conclusion of the witness.

The Court: He may answer.

Exception.

A. That's a pretty broad generalization.

1364 Q. Just your opinion on it?

A. I would say that if the assessments continue with no legislative——(interrupted)

1365 Q. I don't want any ifs nor ands, I want present conditions. And if the court please, I move to strike——(interrupted)

A. I am trying to qualify it so I can answer. (Contin-
[fol. 316] ues:)—no legislative relief——(interrupted)

1366 Q. We assume no legislative relief.

A. Well, (hesitating)

1367 Q. Isn't it true that the payments, the exactions from the state banks at this time create a burden on the state banks with no compensating benefits?

Mr. Abbott: I object as incompetent, immaterial, not proper cross examination and calling for conclusion of the witness.

The Court: Overruled.

Exception.

A. I don't remember the language I used, Mr. Flansburg, but my opinion is this and I think it is what I said to you: I don't believe that the payment of these assessments will break any banks in the future but I do say, whether I said

it to you or not, I say it now; I think the entire Guaranty Fund ought to be wiped out and the Legislature create an entirely new set of conditions which will strengthen the banks.

1368 Q. And that if present conditions continue the benefits to the going banks, to the surviving banks, will not be anything like what they have been and will be a burden to the banks?

Mr. Abbott: Objected to as having been answered.

The Court: He may answer.

Exception.

Mr. Campbell: Objected to the question as not an intelligible question, not stating whether it refers to future benefits already having been received by the banks and if it refers to future benefits intervenors make the point it is immaterial.

[fol. 317] The Court: Overruled, He may answer.

Exception.

A. I don't see how I can answer that question. I very strongly resent dragging in a portion of the conversation. I was talking about the question of legislative benefits. You know that I had a theory the banks should get their benefits from the Legislature and not from the Courts.

Mr. Flansburg: I move to strike out the answer as not responsive.

The Court: Sustained.

Exception.

A. You want that answered yes or no? No qualifications?

1369 Q. I want the answer. Now you know you have an opinion on that and I want your honest answer.

A. If you will just disregard public sentiment and disregard what effect this may have on legislation and take this from the standpoint of the going bank, then there is but one answer to the question, there are no benefits received and there will be no benefits received for the facts are this suit is a part of an exceedingly complicated situation and I don't know what effect this suit is going to have on the people of Nebraska or what the Legislature may do. I know there is

resentment in the Legislature, resentment out in the state. The bankers are accused of repudiating their obligations.

Mr. Flansburg: I move to strike out the portion of the answer that commences with what the Legislature may do as not responsive to the question.

The Court: Motion sustained.

Exception.

[fol. 318] 1370 Q. Now Mr. Woods, isn't it a fact that the payment of the present assessment by the banks, under present conditions, is weakening the state banking system rather than strengthening it?

Mr. Abbott: Object to that as not proper cross examination and leaving out elements that enter into it.

The Court: He may answer.

Exception.

A. I don't believe I want to; there are so many conditions that I cannot exclude from my thinking on this thing so that I can answer.

1371 Q. Under present conditions, all the conditions that you take into consideration in connection with the present payment of these guaranty fund assessments, do they weaken or strengthen the state banking system, in your opinion?

Mr. Campbell: Intervenors object to this as immaterial.

The Court: Overruled.

Exception.

A. I can't answer.

1372 Q. You gave me your opinion the other day.

A. Not just in those words.

1373 Q. What did you say about the state banking system being weakened by these payments and there being no compensating benefits?

Mr. Abbott: I object to his asking what he said in a private conversation.

The Court: He may answer.

Exception.

1374 Q. What did you say to me is what I am asking?

Mr. Abbott: I object to this as immaterial unless it is a basis for impeachment.

[fol. 319] The Court: He may answer.

Exception.

A. I can't remember my language but it will be as I said a little while ago; there is no question, if there are no conditions, if they tell the whole story in this question.

The Court: This question is broader.

A. I am trying to summarize all the facts. A "yes" or "no" answer does not reflect my opinion. I will simply say I can't answer. I don't remember what I said; we were talking about the theory of law suits.

1375 Q. Mr. Woods, isn't it a fact these assessments are a burden without any compensating benefits at this time, or benefits of any kind?

Mr. Campbell: Intervenors object as an unfair and unintelligible question, not stating whether it relates to past benefits, to benefits having been received upon accrued liabilities or whether it refers to future benefits.

The Court: He may answer.

Exception.

A. Your Honor, I don't know how I can answer a question of that kind, so sweeping in its conclusions.

1376 Q. You have no opinion?

A. I have a tentative opinion and a qualified opinion.

1377 Q. And in your opinion the bank Guaranty Fund Law is uneconomic and unsound, isn't that so?

Mr. Abbott: Object to that as not proper cross examination.

The Court: He may answer.

Exception.

A. Yes, I hold that view very positively, that the law is [fol. 320] uneconomic and unsound.

1378 Q. And that the banks are getting no benefits, at this time, isn't that true?

A. I am not sure, that is the reason I hesitate to answer that.

1379 Q. It is a burden that weakens the banking system instead of strengthening it, isn't that true, at this time?

Mr. Abbott: Object to that as incompetent and immaterial.

The Court: Overruled.

Exception.

A. Yes, I think it does very materially, but I am answering from a different standpoint, taking in every consideration, many of which you consider are——

1380 Q. Taking into consideration all considerations, the assessments do weaken the banking system rather than strengthen it, is that true?

A. I think so.

1381 Q. It is a burden on the banks without any compensating benefits?

A. If you will say burden, I will say yes, but if you say without any compensating benefits, you take in too much territory.

1382 Q. You won't answer that?

A. No.

Further cross-examination.

By Mr. Gaines:

1383 Q. You have a report of the Bureau of Banking for 1925, have you?

A. Nebraska?

1384 Q. Yes?

A. I think I have seen it.

[fol. 321] 1385 Q. Calling attention to the report of Nebraska for 1925, showing an abstract of the report of the commercial and savings banks at the close of business December 31, 1922, do you note the item "other real estate" of $3,514,291.12 as of that date?

A. I notice that.

1386 Q. Now, calling attention to the report of the same Department for the year, 1927, as of June 30th, that being the last, the item "other real estate" $13,966,675.86. Note the figure June 30, 1927.

A. I notice it.

1387 Q. Does that show a healthy condition of the state banks in Nebraska, or otherwise, in your opinion?

Mr. Abbott: I object as immaterial, incompetent and irrelevant and for the further reason you should have other data.

Mr. Gaines: This is a consolidation of the statements from all the state banks in Nebraska.

The Court: He may answer.

Exception.

A. Otherwise, I should say.

1388 Q. You mean by that unhealthy?

A. Not healthy, at least.

1389 Q. Do the accumulation of the surplus and undivided profits in the statement of banks tend to strengthen them in a financial way?

A. Yes.

1390 Q. I call your attention from the same report of the Bureau of Banking for the year, published in 1925, of all the state banks and call your attention to the surplus as of [fol. 322] the close of business December 31, 1922 of $7,449,643.40 and of undivided profits, $8,534,773.49.

A. Of what year is that?

1391 Q. December, 1922. Now, calling your attention to the corresponding report as of June 30, 1927, of all of the banks in which the undivided profits is given as $2,414,955.20; surplus $6,685,052.41. What, if anything, do those figures disclose to you with respect to the financial conditions of the banks as between the two periods, decrease in both those items?

A. They don't disclose much unless you go behind the figures.

1392 Q. The fact that the undivided profits had dropped from approximately eight millions down to two doesn't mean anything with respect to the financial condition of the banks?

A. I would say that,—in other words, if the banks in 1922 had valid assets to back up that surplus of seven million and the eight million undivided profits, it would show a loss. In my judgment the banks of Nebraska did not have

valid assets in 1922 to justify that; if they made the proper charge offs they would not have had that much undivided profits.

1393 Q. And does the same rule apply to the later statement of June, 1927?

A. To some extent, but not so much.

1394 Q. In other words, it is your judgment that the financial condition of the banks is not properly set forth in the report, as to statements?

[fol. 323] A. Yes, that is true, but I don't want that statement taken as an implication against the bankers who made up these statements.

1395 Q. It is a fact that they set up their statements as most favorable to the banks?

A. Yes, and consequently——

1396 Q. I don't mean that to reflect on their honesty.

A. No, I don't want it to.

1397 Q. That is all.

By Mr. Campbell, for intervenors:

1398 Q. Mr. Woods, as I understand it, it is your opinion that the capital stock of the bank should be as much as one-tenth of the average deposits?

A. Yes, that is desirable.

1399 Q. To have a healthy or stable condition?

A. That improves conditions.

1400 Q. Now, assuming that on December 31, 1928 the capital stock of state banks in this state was nineteen million dollars and the total deposits were in excess of two hundred fifty two million; in your opinion, was there sufficient capital stock in those banks as compared with deposits, nin teen against two hundred fifty two million?

A. Of course, that is more or less theoretical. There is no established law; that is the custom; the large or more conservative houses increase their capital stock as their deposits get out of line and our state banking situation would be stronger if the banks had more stockholders' [fol. 324] money in the banks.

1401 Q. On the basis you suggest the capital stock instead of being nineteen million would be approximately twenty-five million, under such circumstances?

A. Yes.

1402 Q. Now, in other words that would call for an increase of approximately six million dollars in capital stock to be put in.

A. That is the theoretical ratio, yes.

1403 Q. Now, Mr. Woods, you said that the amount of real estate taken over has created an unhealthy condition. Was the taking over of that real estate the result of the deflation that you described, largely?

A. I think largely, yes. There were cases where it couldn't be ascribed to that but I think largely so.

1404 Q. And that period of 1920 to 1923 was a radically abnormal period in banking, was it not?

A. Yes.

1405 Q. Have the banks of this state ever experienced such a deflation and general economic crisis as occurred in those years?

A. I don't think they have, in the same degree. It was something like it from 1893 to 1896.

1406 Q. In your opinion this was more acute than in the nineties?

A. Yes, I think the degree of the fall in prices, range of the fall in prices was greater, and the period was even more extreme than in 1893 to 1896, from what I have read.

1407 Q. And you would attribute that banking troubles largely to that crisis, plus over banking, plus inefficient [fol. 325] management in banking, plus unwarranted and aggressive loaning during that period?

A. Yes.

1408 Q. In other words, Mr. Woods, the payment of assessments to date has been a very minor factor, in your opinion, in bringing about the distress in banking at the present time?

A. My testimony was that I thought it was not material from 1923 to date. I could give you figures on that if you want them.

1409 Q. Well, you may state what figures you have in mind as illustrative.

Mr. Gaines: I object to that as repetition.
The Court: He may answer.

Exception.

A. The figures I had in mind are—this is what I based my statement on: The total assessments in round numbers for the years, for 1921, 1922, 1923, which banks paid to the Guaranty Fund amounted to $5,300,000. For the years 1924, 1925, 1926, 1927 and 1928 the total was $6,800,000. The capital stock, I mean not the capital stock but the capital available in the business, stockholders' capital, was nineteen million; six million, surplus; three million, undivided profits; total, twenty-eight million dollars; so that the loss for over the five years from 1923 up until this report is made was a little less than one-fourth of the capital employed in the business, that would be 25%; $6,800,000 is a little less than that of $28,000,000. Now the testimony has been most of the banks that have failed have shown on an [fol. 326] average a loss six times the capital of the bank at the time of failure. That would be 600% and the amount of the assessment is 25%, a ratio of 25 to 600, which is 1 to 24. These banks that failed have contributed in five years a total of one-twenty-fourth of their total losses; have contributed to the Guaranty Fund a sum amounting to one-twenty-fourth of the revealed losses when taken over. That is why I don't think those assessments were material. They added to the burden but were not material.

At this time an adjournment was taken until 1.30 p. m. of the same day, February 4, 1929, at which time the following proceedings were had, to wit:

[fol. 327] Cross-examination by Mr. Campbell continued:

1410 Q. Mr. Woods, in direct examination upon the period since 1923 I believe you stated that the Guaranty Fund Law had had a steadying influence and had increased the deposits of the state banks, in your opinion, approximately one hundred million dollars?

A. Oh, no, I did not make it since 1923. Since the law was enacted, not since 1923.

1411 Q. Since the law was enacted in 1910?

A. In 1910. I think it has caused the deposit of a hundred million more in state banks than otherwise would have been deposited in state banks. I said—what I said about 1923 was that from 1923 it had had a steadying influence on deposits in all state banks and that where competitive conditions were not too severe, where competitive conditions were favorable, it had helped to increase deposits in state banks.

1412 Q. Mr. Wood, what do you mean about "competitive conditions being favorable"?

A. Why, where the community is not over-banked and where by energy and skill and alertness on the part of the banks there is additional business to be had.

1413 Q. It is your opinion we have been overbanked?

A. In many communities. I would like to differentiate.

1414 Q. They are badly grouped in some instances?

A. Yes.

1415 Q. In your opinion, has the state as a whole been over-banked during the last five years?

[fol. 328] A. Yes.

1416 Q. It has. And in your opinion is it at the present time over-banked?

A. Yes but not so much so because there has been quite a number of failures, though you can still find plenty of communities having too many banks.

1417 Q. You would say it is still over-banked?

A. I know of no community which is insufficiently supplied with banks.

1418 Q. And, Mr. Wood, in your opinion, could all the banks that are in receivership, or that are in the possession and control of the Guaranty Fund Commission and I will say and both, be eliminated from the banking system of Nebraska and still the state as a whole be adequately banked?

A. Yes.

1419 Q. And in your opinion would such an elimination create a more healthful and normal banking situation in Nebraska?

A. Yes.

1420 Q. By that do you mean that they would more nearly respond to the economic needs and serve such needs in this state?

A. Yes.

1421 Q. Putting it crudely, the inflation period unbalanced the number of banks in this state?

A. Yes.

1422 Q. And the deflation period balanced the number of banks in this state?

A. Slowly, yes.

1423 Q. Now, Mr. Woods, what has been your observa- [fol. 329] tion as to the use that has been made by state banks of the Guaranty Deposit Law in inducing deposits?

Mr. Abbott: I object as immaterial and incompetent and calling for opinion and conclusion.

The Court: He may answer.

Exception.

A. I want to do full justice in answering that question. I know of exceptions that occurred, that of strong state bankers who have always been opposed to the law, who have never solicited business on that basis, who have always said they did not believe it was right or just and that depositors should not rely upon it. There have always been those exceptions. I have to make those exceptions and there are quite a few of them, I would say. Then the state banks have, by advertising, personal solicitation, and by signs used the fact of the Guaranty Law,—ordinarily the regular phrase used was "Deposits in this bank protected by the Guaranty Fund of the State of Nebraska"—have used those things incessantly to increase their deposits.

1424 Q. In other words, that practice has been the rule of the state banks and what you first named constitute outstanding exceptions?

A. Yes.

1425 Q. Now from observations——(interrupted by witness)

A. I would like to make one further qualification. I would like to have my testimony accurate. During the last two and a half years there have been steady additions to

that list of exceptions; they have seen it coming, been hedging. So a lot of state bankers have discontinued the [fol. 330] practice of soliciting business on the Guaranty Fund and have told their customers frankly that they should do business on the basis of their strength and their confidence in the men who owned and managed the bank. I can't give any figures but I know there has been an increasing number doing that.

1426 Q. Mr. Woods, what has been your observation covering the period of the operation of the law, from 1912, as to the influence that such representations by the state banks have had upon depositors in inducing them to make their deposits in the state banks?

A. It has been effective.

1427 Q. And has that been, in your opinion, one of the causes of this estimate of one hundred million dollars of deposits made during that period?

A. That has been a contributing factor.

1428 Q. What has been your observation in dealing with customers and your observation generally in the banking business as to whether depositors believed and relied upon the representation of the banks that their deposits were protected?

Mr. Gaines: I object to that as immaterial, irrelevant and incompetent and repetition.

The Court: He may answer.

Exception.

A. Why, almost—I don't know of any exceptions among depositors in state banks who did not feel the Guaranty Fund was giving them protection, that is, up until a year ago.

1429 Q. Up until a year ago?

A. I don't think there was any doubt in the minds of [fol. 331] the depositors of state banks.

1430 Q. Now, Mr. Woods, has that confidence or belief been a stabilizing factor in preventing runs on state banks, in your opinion?

A. Yes.

1431. And have you made any observations as to the difference in banking in Iowa and in Nebraska, as to runs on the banks?

A. Just as I have read the daily despatches. I made no study in any other state than Nebraska, only very casually.

1432 Q. But the matter of runs upon banks has been materially influenced by this belief, has it not, this belief that the deposits were protected?

A. I think it should be observed a run does not cause insolvency. It embarrasses a bank, but if that bank is solvent a run won't break it.

1433 Q. But in your opinion has it also prevented a withdrawal of deposits so that the banks have had the advantage of the money to loan?

A. Yes, I think that is true.

1434 Q. Would you be able to make an estimate as to the amount of profit that has accrued to the banks from such additional deposits which you estimated at one hundred millions of dollars over the period?

Mr. Gaines: I object to that *is* incompetent and immaterial.

The Court: He may answer.

Exception.

A. I have made no calculation: that runs into very large figures; if my assumption is correct it runs into very large [fol. 332] figures, the total. I would have to do quite a little figuring, I couldn't answer that off hand, what that amounts to.

1435 Q. Mr. Woods, under banking conditions such as have existed during the last five years since the acute period of deflation, can you state about what percentage of profit there has been to state banks upon deposits, grouping both the time and the open accounts?

Mr. Gaines: I object to that as immaterial, irrelevant and incompetent.

The Court: He may answer.

Exception.

A. No, I haven't any tabulation of that.

1436 Q. Under normal conditions, in normal banking conditions in Nebraska, what per cent should a bank realize on deposits, grouped as average?

Mr. Gaines: I object to that as purely speculative, no proper foundation laid.

The Court: He may answer.

Exception.

A. Prior to the slump the,—with the exception of just a few banks that were on the very margin, where it was evident even in those prosperous days that the banks should never have been organized, excepting that class, profits of state banks in Nebraska were running from twenty to, in some cases forty or fifty per cent on the capital stock. Not on all the capital invested, not counting surplus and undivided profits. In many instance where those high percentages were reported banks that had quite a bit of capital,—in many instances where those high percentages of profits were true the percentage would be cut down quite a little bit if you included the capital invested instead of just [fol. 333] capital stock. For example, if a bank had $10,000 capital it would have $20,000 or $30,000 surplus; if it would earn 40% on capital stock that would be $4,000. You see that wouldn't be a very big return on $30,000 capital and surplus. I don't want to seem to give the impression that the banks made unreasonable profits although that impression was current and that's why so many charters were called for.

1437 Q. Caused the organization of too many banks?

A. Yes.

1438 Q. Under normal conditions before the inflation period and under the operation of the Guaranty Law and taking normal banks and then basing it on capital stock, plus surplus what would you say would be the average that such banks made on their deposits?

A. On their deposits?

Mr. Gaines: Objected to as purely speculative, calling for conclusion of the witness without any foundation showing he has sufficient data on which to base an opinion.

The Court: He may answer.

Exception.

A. I would say from 2% to 4% on the deposits.

1439 Q. You were speaking annually?

A. Yes, annually. Some made more than 4% but that would be conservative for the average.

1440 Q. You stated in response to a question asked by Mr. Gaines or Mr. Flansburg that the ratio of failures in Nebraska as compared with other states had little significance since 1928 or in 1928 on account of peculiar local con- [fol. 334] ditions. Will you explain what you meant by "peculiar local conditions"?

A. The South Dakota law had become inoperative several years ago and a large portion of the banks which were insolvent had already taken the count, had already failed. In Iowa the same thing was true, except in greater degree; in those other states their clean up of insolvent banks,—in South Dakota, Iowa and Texas,—it all came more rapidly than in Nebraska. And the reason Nebraska's has come so slow is that in 1923 the Legislature passed a law, previously referred to, creating a Guaranty Fund Commission and reducing the assessments from 1 1/2% to .6%, which stopped the immediate break down of the system in that year. In other words, I know personally of numbers of banks who told me that they were ready to and would nationalize if that old high assessment continued. Their nationalizing would have practically broken down the system in Nebraska because they were larger banks and contributed a large part of this $6,800,000 that I referred to a while ago. Then the creation of the Guaranty Fund Commission and the sale of receiver certificates and the provision by statute to continue insolvent banks in operation kept deferring the clean up period in Nebraska. These conditions which I have just enumerated all tended to put off the day until the insolvent banks reached the point where their reserves went to nothing and they simply couldn't keep open, it was physically impossible to keep open any longer. One of the years when this condition [fol. 335] became true to a marked degree was in 1928 so that a number of banks that had been insolvent for a long time were taken over in 1928 in Nebraska and it was this fact which I had in mind which caused me to say that comparison had no significance.

1441 Q. Mr. Woods, you stated that during the last few years a number of national banks in Nebraska had de-

nationalized. Will you mention some you have in mind, that occur to you?

A. I can't give them all but I can recall that Mr. Flannigan's bank in Bassett de-nationalized. Mr. Flannigan is the former president of the Nebraska Bankers Association. Mr. Minnick, also former president of the Nebraska Bankers Association, converted from a national to a state bank.

1442 Q. Where is his bank located?

A. Crawford, Nebraska. Mr. Phil Hall at Greenwood converted to a state bank within the last two or three years, I can't give the exact date. I can't remember the name of the bank but there was a bank at Humboldt, was it The National Bank of Humboldt, I have forgotten the exact name. There may be some others that I don't know personally.

1443 Q. Without enumerating more, what has been the cause of denationalizing, if you know?

Mr. Gaines: I object as calling for conclusion of the witness, hears-y testimony and no foundation shown.

The Court: He may answer.

Exception.

A. I have not talked with all these members of the banks but my opinion is that it was,—that these conversions were made because in the judgment of these bankers who con- [fol. 336] verted the Guaranty Fund was then and would continue to be a successful force in holding deposits or in bringing up deposits at the time the changes were made.

Mr. Gaines: I object to all this as immaterial, incompetent and irrelevant.

No ruling by the Court.

1444 Q. That includes two past presidents of the Nebraska Bankers Association and the present president of the Nebraska Bankers Association?

A. Yes, sir.

1445 Q. Mr. Woods, are you an officer of the State Bankers Association or just on a committee?

A. No, I am a member of the Council.

1446 Q. Appointed by Mr. Hall?

A. No, that is an elective office, elected by the state Convention.

1447 Q. You have been in touch with Mr. Hall in banking meeting?

A. Yes.

1448 Q. Been in pretty close touch with him recently?

A. Yes.

1449 Q. And you know that his bank is not joining in this present movement, in this case?

Mr. Gaines. I object as calling for hearsay testimony.

The Court. He may answer if he knows.

Mr. Campbell. I withdraw the question.

1450 Q. Is his bank joining with these banks?

Mr. Gaines. I object to that as not the best evidence.

[fol. 257] No ruling by the Court.

Mr. Campbell. Withdraw the question.

1451 Q. What is the name of Mr. Hall's bank?

A. I think the Greenwood State.

1452 Q. Do you know Mr. Dan Rice?

A. Yes, sir.

1453 Q. Is he prominent in banking circles in this state?

A. Yes.

1454 Q. Is he a past president of the State Bankers Association?

A. Yes.

1455 Q. Mr. Wood, do you know whether the bank has joined in this suit?

Mr. Gaines. Object as calling for hearsay testimony.

No ruling by the Court.

1456 Q. Do you know whether Mr. Rice's bank is in the group on the other side of the table?

A. It is not.

1457 Q. What is the name of Mr. Rice's Bank?

A. Dawson State Bank.

1458 Q. Mr. Wood, you stated that, I believe, that there were a great many factors to take into account in determining. I am afraid I am not stating it correctly in determining the effectiveness, so that is not correct. I believe you stated you believed even now the people of the state as

a whole are not really well informed on the condition of the Guaranty Fund?

A. I think that is true; they are still confused as to what it is all about, what the real facts are.

Mr. Campbell: That is all.

[fol. 538] By Mr. Sorenson:

1459 Q. One more question, are you connected with the Lincoln Clearing House?

A. Yes.

1460 Q. What is your position?

A. Secretary.

1461 Q. How long have you been secretary?

A. Twelve years.

1462 Q. To what extent does that bring you in touch with the banking situation?

A. Local, only.

1463 Q. Does it bring you into intimate touch with the local situation?

A. Yes.

1464 Q. Did you hear the testimony of the cashier of the Nebraska State Bank with reference to his own bank?

A. I didn't hear [illegible] testimony.

1465 Q. You were asked this morning with reference to deposits in your bank at the time you became a national bank. Did the average daily deposits in your bank increase after nationalizing?

A. When?

1466 Q. Immediately after?

A. No.

1467 Q. Did they continue the same or decrease?

A. There was quite a shifting; we lost some and got others in their place.

1468 Q. With reference to the loss of deposits, was the loss due partly to the fact you were no longer under the [fol. 539] Guaranty Fund?

A. Wholly, so far as we could tell.

1469 Q. And later on there was an increase in daily deposits, what were the reasons for the increase? Did the fact that you had increased your deposits have anything to do with the fact you had become a national bank?

A. I think some of our new accounts came to us because they had confidence in our bank and also favoring a national bank over a state bank.

1470 Q. Isn't it true the reason for your increase in deposits was largely due to the soundness of the management of your bank and the energy with which you sought business?

A. I think so.

1471 Q. You stated this morning you had certain data to back up your opinion that the Guaranty Fund Law was responsible for a hundred million dollars deposited in Nebraska State Banks since its enactment. Can you furnish that at this time?

A. No, just what I gradually got into the answers. The conversions of nearly all the National Banks in Nebraska in the smaller towns to state banks. The organization of three hundred or four hundred new state banks, many of which were started in towns where there already were banks and which rapidly grew in deposits along with other state banks, and in some instances to the loss of deposits in National Banks and the steady increase in deposits of State Banks up until the crash in prices came. I haven't got the figures here but I have made the computation on that which convinced me that the Guaranty Fund in Nebraska did have [fol. 340] the effect that I have stated.

1472 Q. You testified this morning with reference to the size of state banks and national banks; what more, if anything, can you add to your testimony along that line, comparing the individual state banks with individual national banks in the different towns and cities of the state?

A. Well, I can't give very much more without referring to some data. As I testified this morning in the larger cities the national banks continued to grow and on the whole made a very satisfactory growth right along, notwithstanding the Guaranty Fund Law. In the smaller towns, towns below the size of Fremont, Grand Island, Hastings, Beatrice and towns of that size, for the most part the state banks had a very material advantage and have made the larger growth in deposits.

1473 Q. You testified concerning the amount of deposits in state banks during this period. Can you tell the Court whether these deposits were from farmers who sold their

land or by merchants or what other class of people; what can you tell the Court along that line?

A. In the small towns—I have checked up in the small towns with quite a number of banks, who would have a typical bank of $200,000 or $250,000 deposits. In many instances those deposits would be—sixty to seventy per cent would be interest bearing deposits, time deposits they call them, mostly represented by Certificates of Deposit and those were nearly all owned by farmers and people who were inactive in business, retired farmers or retired merchants. The active merchants accounts were usually de-[fol. 341] mand deposits and much smaller than time deposits. I don't know how it has been recently but very few of the banks, especially on the border and there are 1200 miles of border counties, but what had money in from other states on these C. D's. I have never been able to estimate the amount of money that came into Nebraska from other states. When we were a state bank we used to have unsolicited deposits from Iowa and some from as far east as Indiana and Ohio, because the report was received that deposits were absolutely guaranteed by the state.

1474. Q. What would you say as to the size of the deposits in state and national banks, the individual deposits?

A. I think with regard—there would be no difference in active checking accounts but as regards time deposits I would say state banks received much larger deposits in relation to capital stock than the national banks did.

1475 Q. What was the reason for that?

A. Belief in the complete protection of the Guaranty Fund Law.

1476. Q. Referring to the amounts deposited by separate individuals can you state whether or not depositors would sometimes deposit the proceeds from the sale of their farm?

A. Yes.

1477 Q. Tell the Court what you know along that line?

A. I have in mind one bank up in the middle of the state, $20,000 capital and one individual deposited $33,000 in that bank. The bank was insolvent at the time the deposit was made. Two other men had a joint account of about $20,000 more. That was $53,000 held by two or three men and the [fol. 342] bank was insolvent when deposit was made. They made it because they said they knew the State of

Nebraska was back of the deposits. And I know of another bank fifty or sixty miles from Lincoln that failed about three years ago. One depositor had $40,000 on deposit in that bank. You get the force of that more when I tell you that the total deposits of that bank were $250,000 to $260,000 and $40,000 held by one man.

1478 Q. Do you know whether or not that $40,000 represented all the property of that man?

A. No, I do not.

1479 Q. If you know, state the class of people that have been making deposits in state banks?

Mr. Gaines: Object to that as immaterial.

The Court: Sustained.

Exception.

1480 Q. You stated this morning, Mr. Woods, that there were extraordinary local conditions in Nebraska that caused a large number of bank failures in 1928?

A. I have just outlined that. I meant it was this accumulation of insolvent banks which the law permitted and the failures of which came to a head in 1928.

1481 Q. Do I understand that it is your opinion that the operation of the Guaranty Fund Law from 1923 up to the end of the last six months made possible an orderly adjustment of the situation and made possible the recovery of a good many banks that otherwise would have gone under?

A. I think that is true. A number of men whom I know have now good sound banks, state banks, say they could not [fol. 343] have withstood heavy withdrawals in 1923 because they had so much frozen paper at that time.

1482 Q. In other words, it equalized the loss over a period of years?

A. It gave them sufficient time to earn money, charge off loss and get the bank into good shape.

1483 Q. Did it give them a few years to realize on frozen assets?

A. Yes, I mentioned that.

1484 Q. Referring to your testimony as to the conditions down to July, 1928, how much longer after that date did the same situation continue to exist in Nebraska as to

the Guaranty Fund, as to the benefits of the Guaranty Fund?

A. I can't tell just how rapidly this information got out and was disseminated throughout the state.

1485. What information are you referring to?

A. I am referring to the closing of so many banks in 1928 and the accumulation of large amounts of unpaid deposits. The depletion of cash in the Guaranty Fund and then a little after that the information that certain state banks were going to attack the assessment feature of the law. I don' know just how rapidly or how far that information reached and was understood but in a general way people who took the trouble to inform themselves might have known the fact fairly well any time after October or November and others who had special sources of information could have got it earlier.

1486 Q. What happened in October and November?

A. The State Bankers Association was held in Omaha and the newspapers carried a report that certain state [fol. 344] banks would contest the assessment and refuse to pay the assessment.

1487 Q. Was the report spread that the bankers would refuse to pay the assessment?

A. I think that was carried in the papers in Omaha.

1488 Q. What effect did this announcement have that a large number of bankers were going to refuse to pay their assessment?

A. I can't tell what effect it had for the Lincoln papers touched it rather light, probably many people wouldn't see it, but the Omaha papers played it up with large captions.

1489 Q. What effect would such an announcement have?

A. It would tend to check confidence if it was read and its full significance understood.

1490 Q. Mr. Woods, you are familiar with the fact that the banks did refuse to pay the assessment and did bring this suit involving the Department of Trade and Commerce. What effect did this act have on the situation?

Mr. Gaines: Object to that as immaterial, incompetent.

The Court: He may answer.

Exception.

A. I can only make an estimate from information that has reached me that some of the best bankers in the state have told me the agitation, including the suit, has created some nervousness.

1491 Q. You testified this morning, Mr. Woods, with reference to benefits the banks might derive from assessments in the future. Assuming that the bankers may not derive any benefit from the Guaranty Fund assessments, is it or is not [fol. 345] true that depositors in going banks would nevertheless continue to benefit if the assessments are continued in the event that any of the banks should fail?

Mr. Gaines: Object to that as immaterial and incompetent.

The Court: Overruled.

Exception.

A. All this is a question of the future. I don't see how they would get any benefit under the present law. The law would have to be modified. With the accumulation of interest charges on the present debt and the increased expenses that are, would be, incident to handling the Guaranty Fund I don't see that there would be anything left to take care of future assessments.

1492 Q. Assuming, as stated by Governor Woods and by the retiring Governor McMullen, that the Legislature will make up the deficit in the Guaranty Fund and that interest on the claims will no longer be paid or that the Court will hold it is not oppressive and that the present Guaranty Fund Assessments are continued, would then the Guaranty Fund Law continue to be a benefit, practically, to the depositors in state banks in the event that some of them failed, in your opinion?

Mr. Gaines: Object to that as purely a moot question, does not involve present conditions.

The Court: Overruled.

Exception.

Mr. Sorenson: Withdraw the question.

1493 Q. Assuming that the Legislature, by some future tax or otherwise, should make up the deficit in the Guaranty

[fol. 346] Fund and that the present Guaranty Fund assessments should be continued would the existence of the Guaranty Fund Law continue to act as a magnet to bring deposits to State Banks?

Mr Gaines: Objected to as assuming speculative action.
Mr Sorenson: Withdraw the question.

1494 Q In your opinion Mr Woods have the advantages of the Guaranty Fund Law outweigh the disadvantages and the burdens imposed by it as shown by the evidence in connection with this suit?

Mr Gaines: Object to that as speculative.
The Court: He may answer the question.

Exception.

A I think not that is my conclusion.

1495 Q Counting in the advantages and disadvantages have the advantages of the Guaranty Fund Law outweighed its disadvantages?

A Temporarily yes.

1496 Q Calling your attention to the petition of the plaintiff in this suit and referring to paragraph B of section three of the petition which is the paragraph [illegible] reads as follows: "That said special assessments [illegible] and the other state banks of Nebraska will destroy the state banking system in a few years and compel such banks to go out of business" is that true or not in your opinion?

Mr Gaines: Object to that as calling for an opinion.
The Court: Overruled.

Exception.

[fols 347-350] A Well I don't think that is true. I think it is an exaggeration. I have already stated that any assessment would tend to weaken the system but I don't think the continuation of the law for a few years longer would break the surviving banks.

1497 Q Calling your attention to Section B of paragraph three of the petition of the Plaintiff which reads as follows: "That said special assessments [illegible] and the other state banks of Nebraska will destroy the state banking system in a few years and compel such

state banks to become national banks and all other banks to liquidate," is that true?

A. I think that is an exaggeration. There is a difference between weakening a bank and destroying it. In other words, I have more confidence in the solvency or the strength of the state banks than the writer of that petition. They can stand more punishment than you think they can. They are good banks, I know some of them.

Mr. Sorensen: That is all.

At this time the witness, Mr. Woods, was excused temporarily to allow F. A. Hebenstreit, a witness for the Intervenors from out of the city, to testify.

[fol. 353] Mr. GEORGE W. WOODS resumed the witness stand.

Cross-examination by intervenors.

By Mr. Campbell:

1542 Q. Mr. Woods, assuming there are $252,000,000 on deposit, aggregrate deposits in state banks as of December 31, 1923 and that one half of one per cent of that amount would be the annual payment of $1,260,000 which would be the special assessment which is in controversy in this suit and that the regular assessment is one-tenth of one per cent, which would be $252,000 per year and which regular assessment is not in controversy, what would you say as to the regular assessment being of any benefit whatever?

Mr. Gaines: Objected to as incompetent, immaterial and irrelevant and already answered.

The Court: He may answer.

Exception.

A. It might make a few interest payments; it would not mount up on the principal.

[fol. 354] 1543 Q. And we have alleged in our petition that the Guaranty Fund Law did act as a deception to the public; what would you say as to that, from your experience with banks and depositors and the guarantys held out as being operating, but the income only $250,000 per year?

Mr. Gaines: Objected to as immaterial.
The Court: Let him answer.

Exception.

A. Well, if anybody believed that a Guaranty Fund Law with that small assessment was any good, of course he would be deceived.

Mr. Campbell: That is all.

Cross and recross-examination.

By Mr. Gaines:

1544 Q. The deposits in your bank, after it became a national bank, increased very considerably in the first year and a half, didn't they, upwards of $300,000?

A. It is very difficult for me to recall now as to what the average deposits were compared as to what they were after being, after becoming a national bank. The calls come at different times of the year. Sometimes we have temporary deposits. Some months when temporary deposits are out it isn't at all unusual for a particular call statement to be misleading as to the banks average deposits during the year. Without refreshing my memory I cannot say as to how deposits were from year to year.

1545 Q. What is your best recollection as to whether de- [fol. 335] posits did increase after you became a national bank?

A. I think they did increase, as my memory goes.

1546 Q. You know you did not lose any deposits after you became a national bank?

A. I mean we did not lose in the net result. We lost individuals and made it up with other new accounts.

1547 Q. In testifying to the normal earnings of banks during this Guaranty Fund period do you make any difference between the years prior to 1923 and subsequent?

A. I think, my memory was I was testifying only to years prior to 1920, that is when I was referring to my estimate on normal earnings on deposits.

1548 Q. That was prior to the time the special assessments began?

A. I didn't make any attempt to state what normal earnings were since 1920.

1549 Q. Have they been less or more than prior to that time?

A. Very much less, taking everything into consideration.

1550 Q. Taking charge offs as a part of the expenses, the earnings from 1920 to 1928 have been very much less than for the corresponding period prior to that date?

A. Oh, yes.

1551 Q. Now, I didn't quite follow your logic in figures. I am not an expert in figures. I understood you to say the amount of the special assessments, which during the eight year period has approximated the entire capital stock of the banks, that amount has had no appreciable effect upon the solvency or insolvency of the banks during that period. Am I right?

A. No. You don't make the discrimination that I do.

[fol. 356] 1552 Q. You make it.

A. I said that I thought the assessments for the years 1921, 1922, 1923 at the rate of 1 1/20% was perhaps a minor contributing factor to the failure of some of the banks at that time but since 1923 and since the maximum assessment amounted to only .6% I do not believe that lower and reduced assessment could be considered a material, contributing factor to the failure of these banks. I don't say it doesn't affect the earnings and I analyzed the figures to show the whole amount for five years was only about one-twenty-fourth of the loss as determined by Mr. Peterson in his experience with failed banks.

1553 Q. In other words, you take banks that have failed for the basis of your statement and you take Mr. Van Peterson's statement that the results show that the failure is approximately six times the capital. So that you state that a bank that has failed so much that its losses are approximately six times its capital it didn't make much difference what it had contributed to the Guaranty Fund?

A. It would not make any difference.

1554 Q. If it was busted?

A. I wasn't talking of the earnings where it was trying to clean up.

1555 Q. Now, you have confined your statement as based upon the failed banks. Now, turn your mind to the banks that haven't failed, the solvent banks, and state your judg-

ment about a tax upon those banks of approximately 8½% per annum of their capital stock; does that affect appre [fol. 357] ciably their ability to pay their depositors?

A. To pay depositors?

1556 Q. Yes, sir, I am speaking now of the solvent banks.

Mr. Abbott: Object to that as immaterial.

The Court: Overruled.

Exception.

1557 Q. You understand my question?

A. Yes, I do. I don't think that affects materially their ability to pay depositors so long as they keep even with the board. Of course, if the bank has an operating loss and this is added to the operating loss it is putting the bank that much more in the hole. But you are linking two subjects and——

1558 Q. Lets see whether I am or not. Answer this question. The first duty of the bank is to pay the depositors of that bank, when depositors call for it?

A. Yes, sir.

1559 Q. And it is not solvent until after those depositors have been paid?

A. Yes, sir.

1560 Q. Now, I am asking you if a tax upon the now solvent banks of 8½% per annum of their capital stock, if this does, or tends to affect the ability of that bank to pay its obligation in future to those depositors?

A. The answer is that if there are no compensating benefits received by the bank for this 8%, then it is just so much dead loss.

1561 Q. Doesn't it tend to weaken that bank financially?

A. It might do that; if the bank is not otherwise compensated for that payment it has a tendency to weaken it.

[fol. 358] 1562 Q. Do you know, under present conditions, of any compensating benefit to a solvent bank by the continuance of these special assessments against it?

Mr. Campbell: Intervenors object as not defining present conditions and leaving that matter to the speculation of the witness and particularly when he has stated that he cannot speculate with any accuracy as to what present conditions are and other information has shaken the confi-

dence of the depositing public in banks on which the question is based, upon matters the witness has no information on.

Mr. Abbott: Defendants object for the further reason it is immaterial.

The Court: Both objections overruled.

Exception.

A. I don't think all the inertia of the depositors has been exhausted yet.

1563 Q. That is your answer?

A. I can't say what degree of benefit the banks are still receiving but I have to take into account this very significant fact; there are probably a hundred excellent state banks in Nebraska that could nationalize as soon as they could get the papers and if they felt there were no benefits as charged, they would do that.

1564 Q. I asked for your opinion, if you know of any benefits?

A. Because of my inability to read the minds of the people throughout Nebraska I am unable to answer.

1565 Q. Can you think of any benefits they would derive from a continuation of these assessments?

[fol. 359] Mr. Campbell: Interveners object as he says he does not know the minds of the people.

The Court: He may answer.

Exception.

A. That is to the banks?

1566 Q. Yes, sir.

A. Well, I think, I don't know how widespread the feeling is; it may not be wide spread but I know there is some sentiment in the state that regardless of whether it is injurious or not the banks ought to pay the assessments. Now, if that is wide spread and is sincerely held, if the banks can pay until relieved by the Legislature, there would be some benefits in paying it.

1567 Q. Do you think of anything else?

A. That is all I can think of. It is just a matter of meeting that sentiment which feels the banks are not keeping faith, not meeting their obligations.

1568 Q. That is, there is a sentiment on the part of some people in the state that the present solvent banks owe a

legal obligation to continue to pay these assessments to pay off depositors in banks that have failed?

A. I think that is true. I wouldn't undertake to measure the degree of that sentiment but I know it exists.

1569 Q. Now, assuming that the people of the state of Nebraska all know the present status of the Guaranty Fund, showing a shortage of not less than ten and probably over fifteen millions of dollars, do you think that the continuation of the assessment from solvent banks would benefit the banks in so far as the depositors in the banks [illegible] are concerned?

Mr. Campbell: Interveners object as immaterial, irrelevant, and incompetent, no sufficient foundation, no basis for such a hypothesis.

Mr. Abbott: We object for further reason it is not proper cross examination.

The Court: Overruled.

Exception.

1570 Q. Now you understand the question?

A. I think I do and I think I can answer it if you will put one more qualification in it. That they not only know about these losses but could be made to understand the principles of banking as bankers understand it, then there would be no benefit.

1571 Q. In other words, whatever benefit there is is based on ignorance and self deception or a lack of understanding?

A. Yes, sir.

Mr. Gaines: That is all.

Redirect examination.

By Mr. Sorenson:

1572 Q. You stated that if the people knew the exact condition of the Guaranty Fund at this time and knew banking principles as bankers know them that the further collection of these assessments would be of no benefit to the banks?

A. Yes, that is my guess.

1573 Q. Assuming, however, that the people did know the true condition of the Guaranty Fund at this time and [illegible] knew banking principles and knew that the present governor and the retiring governor had recommended the Legislature, by a luxury tax or otherwise, should make up this deficit and that the assessment would be continued to pay depositors in state banks that may fail, what would be your answer?

A. That would prolong the agony.

1574 Q. In that event, would the Guaranty Fund Law continue to act as a magnet to get deposits for state banks?

A. Yes, I expect it would.

Recross examination.

By Mr. Gaines:

1575 Q. And in the end make an unsound, uneconomic law that would wreck the banks?

A. Yes.

Redirect examination.

By Mr. Sorenson:

1576 Q. You didn't say it would wreck the banks?

A. Possibly wreck is too strong a word but I believe that the present law, the present Guaranty Fund Law is unsound economically and if persisted in will weaken the banks and the banking system to the point where legislative action certainly will have to be taken to save it.

[fol. 302] 1577 Q. You think amendments are necessary?

A. Yes, I firmly do. I think it is the great duty of the Legislature to bring about relief to the present banking situation.

Recross examination.

By Mr. Gaines:

1578 Q. In so far as the present law is concerned is it your opinion the best amendment of the present law is a direct repeal?

Mr. Sorenson: Object to that as referring to legislative action.

The Court: Objection sustained.

Exception.

Witness excused.

Whereupon the reading of the deposition of Mr. Schantz, Exhibit =13, was resumed by Mr. Sorenson.

It now being 4:30 o'clock P. M., an adjournment was taken to the following day, Tuesday, February 5, 1929, at 10 o'clock, A. M.

[fol. 363] Tuesday, February 5, 1929, ten o'clock A. M., Court convened and trial resumed pursuant to adjournment, and the following proceedings were done and had, to-wit:

Mr. Clarence G. Bliss, having heretofore been called and duly sworn as a witness in behalf of the plaintiffs, was recalled for further direct examination and testified as follows:

Direct examination.

By Mr. Gaines:

1579 Q. Mr. Bliss, handing you the paper marked Exhibit No. 16 I will ask you if from your office you made an investigation of the number of banks that had been taken over by the Department of Trade and Commerce since 1920?

Mr. Abbott: No objection to that except that foundation has not been laid.

A. Yes, sir.

1580 Q. Is the paper that I show you such compilation?

A. Yes, sir.

1581 Q. It gives the number of banks and the years?

A. Yes, sir.

Mr. Gaines: We offer in evidence Exhibit No. 16.

Exhibit No. 16 received in evidence, the same being made a part of this Bill of Exceptions, and being attached hereto at page 578.

At the request of Attorney Hotz the Exhibit, No. 16, was read to the Court.

1582 Q. The date is exclusive of reorganizations; there were a number of banks made up the deficit by contributions to the capital stock fund?

[fol. 364] A. Yes.

1583 Q. How many banks have been taken over by your department since December 31, 1928?

A. One.

1584 Q. One has been taken over? One during 1929?

That bank has been turned over to the Guaranty Fund Commission?

A. I will change that. Two have been turned over to the Guaranty Fund Commission during 1929.

Mr. Gaines: That is all.

Witness excused.

Mr. Albert L. Schantz, called as a witness on behalf of the plaintiffs, after being duly sworn, testified as follows:

Direct examination.

By Mr. Gaines:

1585 Q. State your name, residence and business.

A. Albert L. Schantz, Omaha, Nebraska, President, State Bank of Omaha.

1586 Q. Were you a member of a committee of bankers selected by the Governor of Nebraska in the spring of 1927 for the purpose of submitting data with respect to the Guaranty Fund?

A. Yes, sir.

[fol. 365] 1587 Q. I hand you a paper marked Exhibit 4 and ask if you have seen that or a similar statement prior to today?

A. Yes, sir, this report was read at our meeting May 17, 1927.

1588 Q. By whom?

A. The upper part was read and presented by Secretary Van Peterson, Secretary of the Guaranty Fund Commission. And the lower part was presented and read to us by Secretary Bliss, Secretary of Trade and Commerce.

1589 Q. Note the bottom statement, sixty-four banks in classes 5 and 6, after deducting capital and surplus, show net loss of approximately $1,118,000 to be absorbed by the Guaranty Fund. State, if you know, from whom that figure was received?

A. This is Mr. Bliss' statement to our committee.

1590 Q. What examination of the files and papers in the office of the Department did you or any member of the Committee to your knowledge, make in order to verify the correctness of that statement?

A. None whatever; we had no access to the files.

1591 Q. Where was this statement of Mr. Bliss made?

A. In a room adjoining Mr. Bliss' office, a room adjoining.

1592 Q. And about when?

A. About May 17, 1927.

1593 Q. Had there been a conference between the committee and Mr. Bliss prior to that date?

A. There was a conference of the Committee and Governor McMullen several days prior and the Secretary of [fol. 366] Trade and Commerce and the Secretary of the Guaranty Fund Commission were called in by the Governor and he requested them to prepare data for the next meeting and this was several days later.

1594 Q. Whom do you mean by the "Governor"?

A. Governor McMullen.

1595 Q. Between the conference to which you have referred with Governor McMullen and the conference at which Exhibit 4 was produced, had there been any examination of the files or records of the Department of Trade and Commerce by you or the committee?

A. Our committee or myself at no time examined any file or had access to any files.

1596 Q. That report, Exhibit 4, gives the different banks by numbers. In that conference with Mr. Bliss to which

you have referred, were the names of any banks mentioned to you?

A. No; there were no names and nothing was mentioned by number, because they did not want to give the exact information about any special bank or name.

1602 Q. Were there any statements or facts submitted to you at that time or reports?

A. No.

1603 Q. Was anything submitted to you other than the data furnished by Mr. Bliss relating to data of the department?

A. No, sir.

Mr. Gaines: You may cross-examine.

Cross-examination.

By Mr. Abbott:

1604 Q. How large a committee did the Governor appoint, Mr. Schantz?

A. As I recall, about five.

1605 Q. And when was that committee appointed?

A. May, 1927.

1606 Q. What part of May?

A. It would have been shortly before May 17, I would imagine.

1607 Q. A sufficient time prior to May 17th to enable Mr. Bliss to get the data the committee requested?

A. Yes, sir.

Mr. Gaines: Object to that question because it assumes facts that are not in evidence. It was data Governor Mc Mullen requested the secretaries to get together.

Mr. Abbott: Withdraw the question.

1608 Q. It was a sufficient length of time to enable Mr Peterson to get information desired from his department and Mr. Bliss to get the information desired from his Department?

A. Yes, sir.

1609 Q. And the information that was taken up with the committee at that time was compiled from information that covered all the banks of the state?

Mr. Gaines: Object to that because it is not shown that this witness has anything to do with mailing or sending out [fol. 362] this information and it is not proper cross or asking for personal knowledge.

The Court: He may answer.

Exception.

A. The committee had nothing to do with mailing out any reports of any kind that had anything to do at any time with the sale of receivers' certificates.

1615 Q. At these meetings it was agreed between the bankers represented upon that committee and Mr. Paterson and Mr. Bliss' department that this report should go out to the bankers of the state and they should be invited to subscribe to receivers' certificates, isn't that correct?

Mr. Gaines: Object to that as not proper cross examination.

The Court: Overruled.

Exception.

A. No.

1616 Q. What information did you have in that regard, with reference to receivers' certificates?

A. The question of receivers' certificates was not discussed at those meetings.

1617 Q. Was it suggested at that time?

A. Any time the question of receivers' certificates was discussed in my presence at any meetings I always opposed it, from May 17th, on.

1618 Q. But that was the subject under discussion, was the matter of floating a quantity of these receiver certificates, wasn't it?

A. It was not.

1619 Q. The subject was up?

[fol. 370] A. The condition of the banks was what we discussed, as presented by Mr. Peterson and Mr. Bliss. That's the only subject we were discussing.

1620 Q. But following, immediately following and as a part of the same transaction the banks of the state were solicited upon a basis of this report and the committee's knowledge to subscribe to receivers' certificates?

A. Neither my knowledge or the committee's knowledge.

1621 Q. Now, isn't it a fact, Mr. Schantz, that this report went out to the bankers of the state, later, with your knowledge, as a basis for inducing the banks of the state to buy receiver certificates and that you, yourself, subscribed to the receiver certificates?

Mr. Gaines: Objected to for the reason the question assumes a fact not proved or testified to by this report, that this was a bankers' committee report.

The Court: Read the question.

Question read.

Mr. Gaines: Withdraw the objection.

A. No.

1622 Q. You know, as a matter of fact, that the report went out to the bankers later?

A. No.

1623 Q. You didn't know it?

A. No, I learned it in this court.

1624 Q. You were familiar with the report?

A. As it was submitted to our committee.

1625 Q. And you later subscribed to the receiver certificates?

[fol. 371] A. No.

1626 Q. You did not?

A. No.

1627 Q. You never subscribed to any, Mr. Schantz, in May, 1927?

A. No, sir; the last certificates I subscribed to were in April, at a meeting held in April, 1927.

1628 Q. Certain it was in April?

A. I made the statement at that time this was the last certificates the State Bank of Omaha would take.

1629 Q. How many certificates did you subscribe to at that time?

A. $50,000 and I made the statement when I subscribed —— (interrupted)

Mr. Abbott: I object to the witness arguing the question. He has answered it.

Mr. Gaines: I object to this as not proper cross examination. There was nothing asked by me about that.

The Court: Objection sustained.

Exception.

1630 Q. You have taken a large interest in this suit, Mr. Schantz?

A. I have taken an interest in it the same as other bankers have.

1631 Q. You are one of the committee of three that initiated this suit? Answer "Yes" or "No."

A. I can't answer "Yes" or "No".

1632 Q. You are one of a committee of three who signed a letter addressed to all the bankers of the state, asking them to contribute to the suit?

Mr. Gaines: We will admit that Mr. Schantz' bank, the [fol. 372] State Bank of Omaha, is a party plaintiff in this suit and is interested in the outcome.

The Court: He may answer.

Exception.

A. Yes.

1633 Q. You are one of a few that called the first meeting that impelled the institution of this suit?

A. I didn't call any meeting.

1634 Q. Prior to the institution of this suit you and Mr. Stephens called a meeting or participated in a meeting that resulted in the institution of this suit?

A. I attended a meeting at Fremont.

1635 Q. Yes, and you and Mr. Stephens and Mr. Seelenfreund are the committee having this case in charge?

A. We are a committee appointed by the bankers and are acting as their committee.

1636 Q. That is, appointed by the bankers at a meeting that you or Mr. Stephens called?

A. No, sir, at a meeting in Fremont.

1637 Q. At a meeting in Fremont? Who invited you to that meeting?

Mr. Gaines: I want to object to any further questions along this line for the reason the interest of the witness is already shown and admitted.

The Court: Sustained.

Exception.

1638 Q. Yours is the largest State Bank in Nebraska, is it, Mr. Schantz?

A. Yes, sir.

Mr. Abbott: I think that is all.

[fol. 373] Redirect examination.

By Mr. Gaines:

1639 Q. Mr. Schantz, were you present with Mr. Dan Stephens at the office of Mr. Bliss, Secretary of the Department of Trade and Commerce, in the month of September *of September* of last year and at that time, in your presence and to you did Mr. Bliss make this statement or this in substance—"If the special assessments are continued it will result in practically two-thirds of the state banks of this state, the going concerns, being wiped out"?

Mr. Abbott: Object to that for the reason that Mr. Bliss testified that he did not recall such a conversation and that in so testifying he was on the witness stand in behalf of and as witness for the plaintiff in this case, and it is incompetent, irrelevant and immaterial. Now in that connection I want to suggest to your Honor Mr. Bliss was interrogated along that line and I have a copy. He answered "I don't recall that I made it at all. I have had so many conversations I couldn't say what that was; no doubt we talked about conditions surrounding these statements. I neither deny or affirm it, I don't recall". Mr. Bliss testified he didn't recall such a conversation.

Mr. Gaines: That gives me the right to prove it.

[fol. 374] Mr. Hotz: Intervenors object upon the grounds it is not binding upon them, not having been shown any depositors were present and as incompetent, irrelevant and immaterial.

Mr. Abbott: It is open to the further objection that the question usurps the function of the court in that, even on their own theory of the case it is confiscatory, to cause a number of banks to go out of existence; it asks for the conclusion of the witness, is usurping the function of the court, is a matter of opinion and not competent here.

The Court: The question is not free from doubt and for that reason I am going to let him answer.

Exception.

A. Yes.

Recross-examination.

By Mr. Abbott:

1640 Q. How long did the conference to which you refer continue, Mr. Schantz?

A. We were probably in his office for half an hour.

1641 Q. And you discussed a good many things in connection with the Guaranty Fund?

A. We talked banking and nothing else.

1642 Q. And it is your recollection that Mr. Bliss made, in some form or other, the statement to which you refer? [fol. 375] A. I remember very distinctly, because I put the question to him.

1643 Q. You put the question to him, whether it would result in the closing of many banks?

A. I asked him what the result would be if the assessments continued.

1644 Q. For how long a period?

A. For the next year or two.

1645 Q. Then you are telling the Court that Mr. Bliss stated that the payment by the banks of .6 of 1% on the deposits, the equivalent of $600 a year on each $100,000 for two years, that is the payment of 1.2% over a period of two years would close three hundred banks?

Mr. Gaines: Objected to as not proper reflection of the evidence and not the statement of the witness with respect to the matter.

The Court: Let him answer.

Exception.

A. Mr. Bliss' statement wasn't of a period of two years. Mr. Bliss' statement was the banks would peter out very shortly and that within one or two years he would have them all on his hands.

1646 Q. As the result of this Guaranty Fund Assessment?

A. Yes, sir.

By Mr. Hotz, for intervenors:

1647 Q. You do not believe that, do you?

A. Yes, sir.

1648 Q. And you believed that would apply to yours as [fol. 376] well as to other banks?

A. I have a right to believe any statement the Secretary of the Department of Trade and Commerce makes to me. I had confidence in him.

1649 Q. If he erred in his statement you would also be governed?

A. He has access to the files and his statements were very clear. He also has access to the examiners' reports.

1650 Q. But you made no personal investigation of the files and records as you testified to. Your conclusion was the interpretation you placed upon the conversation with Mr. Bliss, as testified to?

A. I have no right to examine the files in his office and I rely wholly on what the Secretary tells me.

1651 Q. Was that statement made by Mr. Bliss the reason for the institution of this present action?

A. No.

1652 Q. That had nothing to do with it?

A. I would not say it had nothing to do with it. All matters were considered.

1653 Q. Were you considering at that time some method of avoiding the assessment?

A. At what time?

1654 Q. At the time of the conversation with Mr. Bliss?

Mr. Gaines: Objected to as not proper cross examination.

The Court: He may answer.

Exception.

A. We told Mr. Bliss at that time what the banks were [fol. 377] contemplating doing, starting suit against the extra assessment made under Section 8028 and Mr. Bliss told us that he thought the banks were justified in starting that kind of an action.

Redirect examination.

1655 Q. Was that also part of the conversation at the same time?

A. That was a part of the conversation at that meeting.

1656 Q. Was the action instituted here and concerning which you have testified, is that the outgrowth of any official action of the State Bankers Association?

A. No, sir.

1657 Q. What was the meeting in Fremont concerning which you testified?

Mr. Gaines: Objected to as not proper cross examination.

The Court: It was brought out on your cross examination.

Exception.

1658 Q. I would like to ask how that meeting at Fremont came to be called?

Mr. Gaines: That is objected to as not cross-examination.

The Court: Sustained.

Exception.

Mr. Hotz: That is all.

Witness excused.

[fol. 378] EXHIBIT No. 16

State Banks Taken Over by the Department of Trade and Commerce

Year	Number
1920	4
1921	25
1922	21
1923	24
1924	19
1925	38
1926	36
1927	41
To December 31st, 1928	57
Total number	265

Exclusive of reorganizations.

Received in evidence.

[fol. 379] Mr. Dan V. Stephens, called as a witness on behalf of the plaintiffs, after being duly sworn, testified as follows:

Direct examination.

By Mr. Gaines:

1659 Q. State your name, residence, and your business.

A. Dan V. Stephens, Fremont, Nebraska, banker and publisher.

1660 Q. Are you acquainted with Mr. Bliss, Secretary of the Department of Trade and Commerce?

A. I am.

1661 Q. Were you present in the office of Mr. Bliss in Lincoln in the month of September, 1928, and at that time did he make this statement, or this in substance: "If these special assessments are continued against the state banks it will result in a great many of them being closed or petering out, or a majority of them?

Mr. Abbott: I make the same objection, I repeat the objection made when the question was propounded to Mr. Schantz.

Mr. Campbell: The same objection is made on behalf of the intervenors.

The Court: Overruled.

Exception.

A. He did.

[fol. 380] Cross-examination.

By Mr. Abbott:

1662 Q. Mr. Stephens, you have taken a large interest in the prosecution of this suit?

A. I have.

1663 Q. You were the moving spirit in initiating it?

A. I was one of the moving spirits.

1664 Q. And who were the other moving spirits?

A. There were probably twenty-five or thirty bankers.

1665 Q. That met at Fremont at your instance?

A. Well, at the instance of a committee.

1666 Q. But you extended the invitation to meet there on this occasion?

A. Yes.

1667 Q. And out of that this suit grew?

A. Yes, sir.

1668 Q. And as a result of that meeting in Fremont, thus initiated by you, the committee was appointed that started this suit?

Mr. Gaines: Objection. Each of the plaintiffs will admit the interest of Mr. Stephens in this law suit. Those questions can only be used as bearing on his veracity. Go ahead.

A. Yes, sir.

1669 Q. And of whom did the committee consist, Mr. Stephens?

A. Mr. Schantz, myself and Mr. Seelenfreund.

1670 Q. Who is Mr. Seelenfreund?

A. The President of the Continental State Bank of Lin- [fol. 381] coln.

1671 Q. That was the committee who employed the attorneys and filed this suit?

A. Yes, sir.

1672 Q. That is the committee who sent out a communication to the other state banks asking them to make contributions to the suit?

Mr. Gaines: Objected to as not proper cross examination.

The Court: Sustained.

Exception.

Mr. Abbott: That is all.

By Mr. Hotz, for intervenors:

1673 Q. For the purpose of showing your interest here you consider, of course, you are on the same basis as the nominal plaintiff, The Abie State Bank, in this action, so far as your position to the case is concerned?

Mr. Gaines: Objected to as calling for the conclusion of the witness and not proper cross-examination.

The Court: He may answer.

Exception.

A. Do you mean by your question that my interests are the same as his, in the same degree, that I would be affected in the same manner that he is affected?

1674 Q. Yes, with the result of the suit.

A. I don't know if I know just what information you wish; do you refer to our different ability to pay the assessment?

1675 Q. No.

A. I don't quite understand.

[fols. 382-387] 1676 Q. The idea is that you are a plaintiff in this action the same as he?

A. Yes, sir.

1677 Q. And that is true with all the others whose names are attached to the petition as party plaintiff in this action?

A. Yes.

1678 Q. You have all contributed to a common fund, employed lawyers and are all interested in the prosecution of the law suit?

A. Yes.

1679 Q. And receive its benefits and burdens accordingly?

A. Yes, sir.

Witness excused.

Mr. Gaines: Plaintiffs rest.

[fol. 388] EXHIBIT No. 17

DAN V. STEPHENS, of lawful age, being by me first duly examined, cautioned and solemnly sworn, as hereinafter certified, deposeth and sayeth as follows, viz:

Examined by Mr. Abbott:

1680 Q. State your name and residence?

A. Dan V. Stephens, 1506 Nye Avenue, Fremont, Nebraska.

1681 Q. How long have you been a resident of Fremont?

A. Forty-two years.

[fol. 389] 1682 Q. What relation do you sustain to the Fremont State Bank?

A. President.

1683 Q. How long have you been president?

A. Since July, 1920.

1684 Q. Were you connected with the bank at the time of its organization?

A. Yes.

1685 Q. When was it organized?

A. In 1904; I would say I was connected with it, I was a stockholder in it.

1686 Q. When did you first actively become identified with its management?

A. In 1920.

1687 Q. Have you available one of its published statements for the year 1920?

A. Yes; did you want it for the record?

1688 Q. Yes.

A. It is probably the only one we have got; it would be a condensed one we put in the newspapers.

1689 Q. You may produce it?

A. Very well; here it is, November 13, 1920.

1690 Q. Is this the only one you have?

A. Yes.

1691 Q. Calling your attention to Exhibit "A," is that a true statement of the condition of the Fremont State Bank as of November 13, 1920?

A. It was assumed to be at the time it was made.

1692 Q. You attested the statement, did you, Mr. Stephens, as correct?

A. Yes, my name is on there.

1693 Q. Having your attention challenged to its correct-
[fol. 390] ness, I ask you if it is a correct statement of the condition of the bank at that time?

A. I think it is correct, I could not swear it is correct because I did not make it; I approved it and assume it is correct.

1694 Q. If you prefer we will ask Mr. Sorensen?

A. Yes.

1695 Q. Mr. Stephens, will you kindly produce a statement of the bank as of December 31st, 1928, and also a statement immediately prior thereto, that is a published statement? (Witness does so.)

1696 Q. Calling your attention to Exhibits "B" and "C," you may state what Exhibit "B" is?

A. That is our condensed statement to the state banking department as of September 20th, 1928.

1697 Q. State what Exhibit "C" is?

A. It is our December 31st statement, 1928, to the banking department.

1698 Q. These are printed copies, Mr. Stephens; apparently there was an original of this from which these copies are taken?

A. Yes, there is; that is with the secretary of the department of trade and commerce.

1699 Q. Mr. Stephens, are those statements, Exhibits "B" and "C," correct and true statements of the condition of the Fremont State Bank as of the respective dates, Exhibit "B" for September 20th, 1928 and Exhibit "C" for December 31st, 1928?

A. I assume they are; I did not make those statements and I cannot swear to something I don't know anything about, but I think they are correct. I did not make them, I don't keep the books, Mr. Sorensen is the proper man to [fols. 391-393] answer those questions.

Mr. Abbott: We offer in evidence Exhibits "B" and "C."

Mr. Sidner: No objection on the ground that they are not originals.

Exhibit "B" appears on page 5 hereof and Exhibit "C" on page 6.

[fol. 394] 1700 Q. Mr. Stephens, what was the capital and surplus of the Fremont State Bank at the time you became connected with it in 1920?

A. $50,000 capital and $11,000 surplus and $7,277 undivided profits.

1701 Q. What was the capital on December 31st, 1928?

A. $75,000.00.

1702 Q. From what sources was the extra $25,000 of capital obtained?

A. Paid in in cash.

1703 Q. By the stockholders?

A. By the stockholders.

1704 Q. Aside from the $75,000 capital, has there been any other paid in capital or surplus by the stockholders?

A. We paid in at that time $50 a share surplus with that

capital; we paid in $25,000 and $12,500 surplus, at $50. a share.

1705 Q. Then the capital and surplus paid in by the stockholders has been $87,500.00?

A. Yes; they might have paid in $10 a share in the beginning, 1904.

1706 Q. Do you have readily accessible the record of the dividends paid each year?

A. I haven't got them by the year but I think I have got them here in the sum total since 1920.

1707 Q. I would like to have you, if you will, give us the percentage of the dividends paid by the Fremont State Bank each year since its organization, as disclosed by your books?

A. We paid eight per cent continuously since I took possession of the bank in 1920, annually; four per cent semi-[fol. 395] annually.

1708 Q. Have you declared any special dividends?

A. No.

1709 Q. Have any part of the earnings been devoted to the capitalization of any other business?

A. No sir.

1710 Q. Then the capital, surplus and undivided profits of December 31st, 1928, plus these eight per cent annual dividends account for all the profits of the Fremont State Bank?

A. Yes.

1711 Q. And the surplus of the bank, other than the items you have testified to as having been paid by the stockholders was acquired by earnings?

A. Yes.

1712 Q. What was the present surplus of the bank as of December 31st, 1928?

A. Just what this statement shows.

1713 Q. They seem to be combined in the statement?

A. The surplus at that time was $50,000, the closing of our books for the year is $50,000.

1714 Q. What was the amount charged off against earnings in the year 1928?

A. I don't believe I can answer that unless I see the books.

1715 Q. Giving the same by semi-annual periods; you appreciate I mean charged off as other than operating ex-

penses; I have reference to what is commonly referred to as losses?

A. The first half of the year we charged off $3388.15, and the second half of the year $4805.16.

1716 Q. When was the capital increased, Mr. Stephens, from $50,000?

A. April, 1926.

[fol. 396] 1717 Q. When was the $12,500 surplus paid in?

A. It was paid in at the same time the capital was subscribed.

1718 Q. Who has been in active, executive management of the bank since 1920?

A. I am the executive officer and Mr. Sorensen is the active officer.

1719 Q. You have had your office here and in direct control of it and have had since 1920?

A. Oh yes.

1720 Q. You have been active in the bank since you became president in 1920, I take it?

A. Yes, sir.

1721 Q. Are there any reserves set aside from the profits in the items in the statements, September 20, 1928 and December 31, 1928?

A. No sir, nothing that does not show in our statements.

1722 Q. Now since you became identified with the bank, Mr. Stephens, I take it you have had public deposits, that is public funds?

A. Yes, we have had county and city deposits.

1723 Q. What about the school district?

A. We haven't had any other than the city treasurer has deposited with us.

1724 Q. You get the city school district funds through the city treasurer?

A. Yes.

1725 Q. Have you had some public funds of adjacent municipal subdivisions like townships or country school districts?

A. If we have I don't know; we may have.

[fol. 397] 1726 Q. You have had such public deposits, I take it, ever since you have been identified with the bank?

A. Yes.

1727 Q. Have you at any time up to July, 1928, had you give- any bonds for any of these public deposits?

A. Practically all the time; no, two or three years ago, we did not give bonds. When I took the bank we gave bonds, not knowing that we did not have to, and then a couple of years ago, or such a matter, we began to put up Liberty bonds, voluntarily.

1728 Q. When you ascertained, under the laws as a state bank that you did not have to put up bonds, you ceased giving bonds?

A. For a short period of time.

1729 Q. Then later you voluntarily put up Liberty Bonds?

A. Yes, but the county and city did not require it of us.

1730 Q. I take it, Mr. Stephens, you did that because you wanted to do it and because the other two banks of Fremont were doing so?

A. No, that was not the reason.

1731 Q. When was it you started putting up Liberty bonds?

A. Well, a little less than a year ago or about a year ago.

1732 Q. Prior to that time this bank had not put up, to your knowledge, a bond for public deposits except as you testified to where they were put up on account of lack of knowledge of the law?

A. No.

1733 Q. Mr. Stephens, prior to 1930, when you became president and active in the management of the bank were you active as a banker?

[fol. 398] A. No sir.

1734 Q. Mr. Stephens, since you have been identified with the bank have you done some advertising of the guarantee fund law and its application to your bank?

A. Yes, quite considerable.

1735 Q. Do you have collected together copies of your advertising, newspaper advertising and pamphlets?

A. I don't know whether we have or not, we might find out if we rummaged around here.

1736 Q. Do you have a scrap book or a file in which you keep these matters?

A. Witness produces a scrap book.

1737 Q. Mr. Stephens, are you familiar with the advertising, a page or approximating a page each, about twenty-six in number, that were run in the Omaha Daily Bee through June, July, August and September, 1926?

A. I remember that in a general way.

1738 Q. Do you recall that last advertisement, I think No. 26, containing a list of the banks inserting that advertisement?

A. Yes, I remember that.

1739 Q. Was your bank one of the banks?

A. I think it was, it should have been.

1740 Q. Did your bank contract with Bee as one of the papers causing the insertion of those advertisements and paid its proportionate share?

A. It did.

1741 Q. In the preparation of the advertisements did you refer and consult with Mr. Wilson, the advertising manager of the Omaha Bee as to some of the matters that were in?

[fol. 399] A. Yes.

1742 Q. Prior to their publication and preparation?

A. Yes sir.

1743 Q. Were copies of the advertisements, or some of them, submitted prior to that time, prior to the time they were published?

A. Some of them were.

1744 Q. Was a similar advertisement published about that same time and to the same extent or rather identical advertisements published in the Fremont Evening Tribune of Fremont?

A. Yes sir.

1745 Q. State if you know what banks caused the insertion of those advertisements? In the Fremont Evening Tribune?

A. The Fremont State Bank.

1746 Q. Did other state banks of Dodge county participate in it?

A. I think they did.

1747 Q. Who paid the expense of that advertising?

A. I think our bank paid half of it and the other state banks of the county paid the remaining half.

1748 Q. Now Mr. Stephens, since you became identified with the bank in 1920, have you yourself prepared and caused the publication continuously of other advertising matter of a similar purport?

A. Up until the time it became certain that the guarantee fund was not going to be able to pay its losses.

1749 Q. When was it that you stopped your advertising?

A. I think the last advertising was around sometime about a year ago. Of course we have had advertisements in the paper explaining the guarantee fund situation since [fol. 400] then, follow- the failure at Scribner and North Bend, in order that people might understand how the law was to be administered, but not advertising its merits at all.

1750 Q. Did your advertisements of its merits continue up to about a year ago?

A. Up to about a year ago when I began to have doubts in my mind as to its ability to pay out.

1751 Q. Has your bank circulated some pamphlets with respect to the guarantee fund, Mr. Stephens, as advertising?

A. Yes, we have, in years gone by.

1752 Q. How many different pamphlets have there been that you have circulated?

A. I recall only one; there might be more than that but I recall only one pamphlet.

1753 Q. Pamphlets or other advertising matter?

A. Of course we have had advertisements in the Tribune continuously throughout the years.

1754 Q. Advertising the merits of the guarantee fund and the fact that your bank was protected by it?

A. That was only incidental of course to our advertising campaign.

1755 Q. Mr. Stephens, calling your attention to the pamphlet that I have had marked Exhibit "D", you may state, if you know, what that is?

A. Yes, I am quite familiar with it, it stated the situation as it was at that time.

Mr. Sidner: I move to strike out the answer, the question calls for a yes or no answer.

A. Yes sir.

[fol. 401] 1756 Q. You may state what it is?

A. It is a question-aire designed to clarify the guarantee fund law in the minds of depositors.

1757 Q. Who prepared that?

A. I did, and a darned good job too.

1758 Q. And who had that printed?

A. I did, that is the Fremont State Bank.

1759 Q. When was that prepared and printed, about?

A. It is dated November 7th, 1925.

1760 Q. Is that about the time it was done?

A. That is about the time.

1761 Q. How many of those did you cause to be printed?

A. Probably 5000 or something like that.

1762 Q. What disposition did your bank make of them?

A. Sent them to our customers.

1763 Q. Did you at that time initiate or notify other banks likewise to circulate them?

A. I don't remember that I did.

1764 Q. Mr. Stephens, did you in the year 1926 prepare the pamphlet entitled, "The bank guarantee law challenged and a red hot answer by a Nebraska banker?"

A. I issued such a pamphlet somewhere about that time.

1765 Q. And prepared it?

A. Yes.

1766 Q. Will you produce one of the pamphlets that you prepared and issues about that time?

A. (Witness produces pamphlet marked Exhibit "F".)

1767 Q. When was it that you prepared and had printed [fol. 402] this pamphlet Exhibit "F," Mr. Stephens?

A. It was sometime during the few weeks following April, 1925, or a few months.

1768 Q. How many of those did your bank have printed?

A. It seems to me it was just for our correspondents; I don't remember the number but my recollection is that it was only a few hundred copies.

1769 Q. What disposition did you make of them?

A. Well, we sent them out to correspondents here and there who were making inquiries concerning the Nebraska situation; the guarantee law was being attacked in other states and we were defending the state's record under the guarantee law.

1770 Q. Had you through the years from 1920 to 1927, inclusive, Mr. Stephens, made some public addresses with reference to the guarantee fund law?

A. Yes sir.

1771 Q. What bodies did you address during those years with reference to it in the state of Nebraska?

A. I did not understand your question; I thought you referred to printed addresses in my answer. I think I have talked on the subject at different times when we have been trying to devise ways and means of improving the guarantee law at our state bankers' and other meetings in various groups, but not very often.

1772 Q. With reference to the session of the legislature of 1923, at the time the law was materially amended, what contact did you have in the actitivies resulting in that amendment?

A. I made the first rough draft of the guarantee fund [fol. 403] Commiss- act as it was finally written into the statute, and made speeches throughout the state, advocating the passage of that law for the purpose of giving greater security to its administration.

1773 Q. Did you appear before the legislature itself?

A. Yes sir.

1774 Q. Were you occupying any official position or committee position?

A. I think I was on the legislative committee at that time.

1775 Q. Of what?

A. The state bankers' association.

1776 Q. Did the other members of the committee appear likewise with you in that respect?

A. Yes sir.

1777 Q. Was the law as passed substantially the law as proposed by your committee?

A. I think there were a few minor amendments made to it.

1778 Q. Do you recall now what those were, Mr. Stephens?

A. No, I do not.

1779 Q. Now this legislative committee of the state bankers' association, how was that created, Mr. Stephens?

A. By the executive council of the state bankers' association.

1780 Q. The state bankers' association is an organization of the bankers of the state?

A. Yes, state and national.

1781 Q. And has been for how long? Since prior to your recollection?

A. Yes.

1782 Q. And this legislative committee is one that is provided for by the by-laws and organization of that body, is it?

[fol. 404] A. I don't know whether it is provided for or not; it exists anyhow.

1783 Q. And has, as far back as you can remember?

A. Yes.

1784 Q. How frequently does the state bankers' association meet, Mr. Stephens?

A. Once a year.

1785 Q. During the intervals between the meetings what part of or officials have the direction of its activities?

A. The executive council.

1786 Q. How many members are there on the executive council?

A. One, I think, from each of the seven groups, or representatives of the seven groups of bankers.

1787 Q. Is the state divided into groups?

A. Yes.

1788 Q. How many groups?

A. Seven.

1789 Q. That is the state of Nebraska is arbitrarily divided into seven parts and called groups?

A. Yes.

1790 Q. And representatives of each of those groups that have the direction of the state bankers' association and called the council?

A. Yes.

1791 Q. Have you been a member of that council?

A. I was at one time.

1792 Q. When were you a member of the council?

A. I don't remember; I think it was about the time we [fols. 405 & 406] enacted the guarantee fund commission act.

Mr. Abbott: We offer in evidence Exhibit "F". Exhibit "F" is attached at page 20 of this record.

[fol. 407] 1793 Q. Will you kindly produce one of the copies of the form of certificates of deposit that you have been using from the time, to your knowledge, that you came into the bank in 1920 up until quite recently? Is that one of them?

A. Yes. (Witness produces Exhibit "G".)

1794 Q. This form, Exhibit "G", seems to have been cancelled in 1924, dated June 13, 1923; is that the form you were using at the time you came into the bank?

A. I don't know, I never saw it before.

1795 Q. You have seen the forms?

A. I never saw it until just now; I am not the proper person to inquire about that, I don't pay any attention, to those things at all

1796 Q. Mr. Stephens, did you, from the time you came into the bank in 1920, and thereafter until recently, have signs exhibited on the interior or exterior of your bank, referring to the guarantee fund?

A. We had signs, "depositors protected by the guarantee fund" on our windows until we discovered the guarantee fund were not going to pay their losses and I cleared them off.

1797 Q. When was that?

A. We finally made up our minds they were not going to be able to pay off sometime in August or September, 1928; we had doubts much before that of legislative enactments that could save the situation.

1798 Q. In August of 1928 did you remove the signs?

A. I don't remember the dates but as soon as we concluded w- removed the signs.

1799 Q. As near as you can tell was it in August or Sep- [fol. 408] tember, 1928, that you removed them?

A. Yes.

1800 Q. And at that same time or about that time did you change your certificate form and drop that recital?

A. No, we changed the certificate form a year or two ago; we haven't really had it on our checks for a long time.

At this point, it being twelve o'clock noon, a recess was taken until two o'clock P. M.

Two O'Clock P. M.—Hearing Resumed

1801 Q. Mr. Stephens, during the years since you took charge of the Fremont State Bank in 1920, and up until, say about the middle of 1928, to what extent in each year

did you advertise by newspaper advertising the protective features of the guarantee fund?

A. Well, I have used, or we carried a few columns of advertising on the subject at different times each year.

1802 Q. Maybe we can get at it in rather a general way, in this manner; did this advertising that you inserted through the period, in a general way, cover the same matters and the same points as are set forth in the questionnaire identified here by you as Exhibit "D"?

A. Yes sir.

1803 Q. Now Mr. Stephens, have you been generally familiar with the advertising that the other state banks were doing through that same period?

A. In a general way.

1804 Q. You may state whether or not, during that period the state banks generally in the state were carrying [fol. 409] on about the same line of advertising that you were?

A. No they were not; I was the main advertiser and the others once in a while would copy something we had in the papers here; the facts are very few banks advertised other than those statements on the certificates and no windows.

1805 Q. You, I take it, of course have paid the general assessments that have been levied for the guarantee fund up until this last one?

A. Yes sir, paid them gladly because I thought they benefited us.

1806 Q. What percentage of the stock of the Fremont State Bank do you personally own, Mr. Stephens?

A. About fifty-one per cent.

1807 Q. Have you owned that much or more ever since you have been identified with it?

A. Well, not so much during the first years, but I have owned approximately that much; I mean that to cover the period from 1920. Prior to that time I only had a small amount of stock in the bank.

1808 Q. At the time of the organization of the Fremont State Bank it was organized originally as a savings bank?

A. Yes.

1809 Q. And operated how long?
A. Until 1914.

Dan V. Stephens.

[fol. 410] J. M. Sorensen, of lawful age, being by me first duly examined, cautioned, and solemnly sworn, as hereinafter certified, deposeth and sayeth as follows, viz:

Examined by Mr. Abbott:

1810 Q. State your full name and age?
A. J. M. Sorensen, thirty-eight.
1811 Q. What is your occupation, Mr. Sorensen?
A. Vice president of the Fremont State Bank.
1812 Q. Are you active in its management?
A. Yes sir.
1813 Q. Subject to the president, are you the active and controlling head of the business?
A. Yes sir.
1814 Q. How long have you occupied the position that you now have, Mr. Sorensen?
A. Three years.
1815 Q. Prior to that time what were you?
A. Cashier.
1816 Q. How long were you cashier?
A. Since 1920, up until the time I was elected vice president.
1817 Q. Prior to 1920 what were you?
A. Assistant cashier for a couple of years and bookkeeper before that.
1818 Q. For how long a period?
A. From September, 1916.
[fols. 411 & 412] 1819 Q. Have you been, ever since your connection with the bank, familiar with its books and records?
A. Yes sir.
1820 Q. Handing you a paper identified as Exhibit "A", you may state if you know what that is?
A. That is a copy of the report made to the banking department November 13, 1920.

1821 Q. Do you know whether it is a correct statement of the condition of the bank as of that time?

A. Yes sir.

1822 Q. Is it?

A. Yes sir.

1823 Q. The J. M. Sorensen whose name is attached there as cashier, that is yourself?

A. Yes sir.

1824 Q. You prepared it, did you?

A. Yes sir.

1825 Mr. Abbott: We offer Exhibit "A" in evidence and Mr. Sorensen having declined to part with the possession of it, we ask that a copy of it be inserted in lieu thereof, to which the parties agree and waive further foundation.

Mr. Sidner: Plaintiffs are not objecting to the offer on the ground that it is a copy.

Defendant's Exhibit "A". Report of the condition of the Fremont State Bank of Fremont, Nebraska, Charter No. 791, in the State of Nebraska at the close of business, November 13, 1920.

[fol. 413] 1826 Q. Mr. Sorensen, calling your attention to Exhibit "G", I will ask you to examine that and state if you know what that is?

A. It is a certificate of deposit issued by the Fremont State Bank.

1827 Q. Is that the original certificate issued to the depositor named, as of the date of the certificate?

A. Yes.

1828 Q. And thereafter cancelled by payment?

A. Yes sir.

1829 Q. Is that the form of certificate of deposit in use by your bank in June, 1923?

A. Yes sir.

1830 Q. And for what period of time, to your knowledge, had that same form of certificate been in use? Been in use by the bank prior to that time?

A. For several years at least.

1831 Q. As far back as you were employed by the bank in 1916?

A. I don't recall of any change being made in it.

1832 Q. As far as you know that certificate has been in use ever since you came into the bank?

A. Yes.

1833 Q. Following 1923 for what period did that same form of certificate continue in use?

A. Up until the time that the law was changed so that the certificates were to be made non-negotiable.

1834 Q. And at that time did you have some certificates printed?

A. Yes.

[fol. 414] 1835 Q. Then you left the guarantee feature off from that time on?

A. We bought a stock form of certificate after that.

1836 Q. That did not have that particular phrase on?

A. No.

1837 Q. Mr. Sorensen, are you familiar with the advertising done by the Fremont State Bank since you have been connected with it?

A. Yes sir.

1838 Q. During those years how extensive an advertiser in the newspapers and particularly in the Fremont Tribune has it been?

A. Quite extensive.

1839 Q. How many hundreds or thousands of inches does it use in the year, in the Tribune for instance?

A. In the last couple of years I think we have used between 1200 and 1500 inches a year.

1840 Q. And prior to that time?

A. I don't remember.

1841 Q. It would be a larger quantity, would it?

A. Well, it might have been for one or two years, I am not sure about that.

1842 Q. You have used several hundred inches a year, have you, since 1916?

A. Not every year.

1843 Q. Since 1920 have you used 500 inches or more a year?

A. Yes, I am quite certain we have used that much or more.

[fol. 415] 1844 Q. You may state whether you have made a search since we adjourned at noon to see whether you could produce copies of the advertisements you have inserted?

A. We could probably find some of them but we haven't copies of all of them. Such as we could find are in the storage vault in the basement among old records and papers.

1845 Q. This advertising that you have done, in the main had featured what particular matter, if anything?

A. Well, we have featured a good many.

1846 Q. In the main, what particular matter?

A. We have featured community activities and the guarantee fund.

1847 Q. Mr. Abbott: We offer in evidence Exhibit —. This Exhibit is attached hereto at page 30 of same.

No exhibit number and no exhibit attached.

[fol. 416] Defendants' exhibit.

[fol. 417] 1848 Q. Now Mr. Sorensen, during the years since 1916, have you been familiar with the advertising done by the other banks of Dodge County?

A. In a general way I have noticed them and read them.

1849 Q. Have they, during the same period, been continuously advertising in the newspapers?

A. Well, some of them have.

1850 Q. Most of them?

A. I think so.

(Signed) J. M. Sorensen.

R. H. Chappel, of lawful age, being by me first duly examined, cautioned and solemnly sworn, as hereinafter certified, deposeth and sayeth as follows, viz:

Examined by Mr. Abbott:

1851 Q. State your full name and age?

A. Roy H. Chappell, forty-one.

1852 Q. What is your occupation, Mr. Chappel?

A. Well, I am managing a print shop down here.

1853 Q. The Chappel Printing Company?

A. Yes sir.

1854 Q. Are you one of the owners of the Chappel Printing Company?

A. Yes sir.

[fol. 418] 1855 Q. How long have you been in the printing business in Fremont, Mr. Chappel?

A. Ten years.

1856 Q. What is the general nature of your printing business? Do you publish a paper or otherwise?

A. No, commercial and bank work altogether.

1857 Q. Has it been during the ten years you have been in business?

A. Yes.

1858 Q. Over what territory have you been doing commercial printing and for banks during the last ten years?

A. We take in every town of the Platte river clear out to the Wyoming border and then we have a strip in the South Platte down to Seward and York.

1859 Q. How many counties would you say you cover in the South Platte?

A. Saunders, Butler, Hamilton, Seward, Lancaster, Sarpy, Cass and Douglas.

1860 Q. This territory you mentioned, do you cover that by salesmen?

A. By salesmen, yes, cover that every ten weeks.

1861 Q. In the territory that you do not cover by travelling salesmen do you do any mail order business in that?

A. Very little, not anything to speak of.

1862 Q. As to this territory you have referred to and during the period that you have referred to, how many banks do you do business with?

A. In our travels we have probably done business with everyone of them.

[fol. 419] 1863 Q. Are you familiar with the form of certificates of deposit and stationary that these banks have been using for years past?

A. Practically all uniform.

1864 Q. In your travels have you had access to the forms they were using as well as the forms you prepared and printed?

A. They usually furnish copies for their forms.

1865 Q. Do you do some travelling yourself?

A. Very little.

1866 Q. Have you produced here, Mr. Chappel, forms of

printing that you have been doing for these banks for the last ten years?

A. Yes.

1867 Q. Referring to the papers which you have just produced, which are identified as Exhibits "H-1" to "H-9" inclusive, are those the originals of printing done by you for the respective banks whose names appear on them?

A. They are.

1868 Q. Referring to this litle circle on "H-1", "deposits of this bank are protected by the guarantee fund of the State of Nebraska," do you know to what extent that that insignia is used by the state banks in the territory you have mentioned, and have been using for ten years past?

Mr. Sidner: Objected to as incompetent, immaterial, irrelevant, no sufficient foundation laid, not in issue in this case, the evidence already disclosing that this man does not [fol. 320] call upon the trade.

1869 Q. Have you done any of the travelling in this territory, Mr. Chappel, that you have referred to?

A. I did.

1870 Q. To what extent and when did you cover the territory?

A. I covered the territory from 1921 to 1925, to *to* July, 1925.

1871 Q. And in travelling the territory to what extent did you call on the banks in that territory?

A. I called on all of them.

1872 Q. In calling on these banks as the representative of the Chappel Printing Company, did you, in figuring on work with them and otherwise, did you come in contact or did they exhibit the forms they were using?

A. They did, yes sir.

1873 Q. You have been doing printing for them as you have testified?

A. Yes.

1874 Q. I will repeat the question; during the years 1921 to 1925, when you were covering the territory, to what extent was this circle that appears on Exhibit "H-1" in use by the banks in that territory on their certificates of deposit?

Mr. Sidner: Objected to as incompetent, immaterial, irrelevant, not the best evidence, no sufficient foundation laid, calling for the conclusion of the witness, no evidence upon [fol. 421] which to base such a conclusion having been offered in evidence.

1875 Q. This circle, that is I refer to the circle, "deposits in this bank are protected by the guarantee fund of the State of Nebraska," or the same words in a different arrangement on the certificate?

Mr. Sidner: Objected to as incompetent, immaterial, irrelevant, not the best evidence, no sufficient foundation laid, calling for the conclusion of the witness, no evidence upon which to base such a conclusion having been offered in evidence.

A. Well, I would say it was used on at least sixty-five to seventy per cent or practically all of the printing we did for state banks.

1876 Q. And on certificates of deposit to what extent?

Mr. Sidner: Objected to as incompetent, immaterial, irrelevant, not the best evidence, no sufficient foundation laid, calling for the conclusion of the witness, no evidence upon which to base such a conclusion having been offered in evidence.

A. In about one half, I would say, about fifty per cent.

1877 Q. Now in the printing that you have done for the state banks during the years 1926 and 1927, with particular reference to certificates of deposit, what percentage [fol. 422] of them carried that wording, "deposits in this bank are protected by the guarantee fund of the State of Nebraska?"

Mr. Sidner: Objected to as incompetent immaterial, irrelevant, not the best evidence, no sufficient foundation laid, calling for the conclusion of the witness, no evidence upon which to base such a conclusion having been offered in evidence.

A. That was incorporated in the body of the certificate in practically all of them after the law went into effect.

1878 Q. Was that the wording on all of them before that?

Mr. Sidner: Objected to as incompetent immaterial, irrelevant, no sufficient foundation laid, calling for the conclusion of the witness, no evidence upon which to base such a conclusion having been offered in evidence, not the best evidence.

1879 Q. I am referring to certificates of deposit, that is between certificates of deposit and other stationery, do you recall any certificates of deposit that you came into contact with until the last year, that did not contain the wording, "deposits in this bank are protected by the guarantee fund of Nebraska?" Do you recall any certificates of deposit in those years that did not have that?

[fol. 423] Mr. Sidner: Objected to as incompetent, immaterial, irrelevant, not the best evidence, no sufficient foundation laid, calling for the conclusion of the witness, no evidence upon which to base such a conclusion having been offered in evidence.

A. Oh yes, we printed some.

1880 Q. Mr. Abbott: We offer in evidence Exhibits "H-1" to "H-9" inclusive.

Mr. Sidner: Objected to as incompetent, immaterial, irrelevant, and no sufficient foundation laid.

Exhibits "H-1" to "H-9," inclusive are attached to this record at page 37 (page 432 of this B. of Ex.).

1881 Q. Calling your attention to Exhibits "I," "J" and "K", do you know who printed those pamphlets?

A. The Chappel Printing Co.

1882 Q. Were you familiar with them at the time they were printed?

A. Yes.

1883 Q. On the back of Exhibits "I", "J" and "K", appears the indorsement or phrase "compliments of the American State Bank, Scotts Bluff, Nebraska" on Exhibit "I", and on the back of Exhibit "K" "compliments of Security State Bank, Plainview, Nebraska," and on the back of Exhibit "J" "compliments of the South Omaha State Bank," you may state for whom you printed those?

[fol. 424] A. They were printed for the banks mentioned above.

1884 Q. What quantity did you print of each?

A. Five hundred to one thousand to each bank with the exception of the Omaha State Bank, they got twenty-five hundred.

1885 Q. And the others got five hundred to one thousand?

A. Yes.

1886 Q. Did you print similar pamphlets for other banks containing this same matter except the three lines on the first page after the words "compliments of?"

A. We did.

1887 Q. And where the bank statement appears on the reverse side after the statement of the particular bank for whom it was printed?

A. I can't tell you.

1888 Q. Where it does appear?

A. Well, I can't give you that information whether it appeared on all of them or part of them.

1889 Q. Referring to those exhibits and that part of them constituting questions and answers, did you print that matter on similar pamphlets for other banks?

A. We did.

1890 Q. For how many different banks did you print that identical matter on pamphlets?

A. Well, I will have to give you that record tomorrow.

1891 Q. Will you look that record up and give me a list of the banks for whom you printed those particular pamphlets and the number printed for each?

[fol. 425] A. I will.

1892 Q. Were those pamphlets that you printed transmitted to those banks by you, that is the respective banks?

A. Yes sir.

1893 Q. Who paid for them?

A. The banks for whom they were printed.

1894 Q. I note that on Exhibit "J" a statement of the particular bank appears but on Exhibits "K" and "I" statements of the particular banks do not appear; can you now tell which banks had their statements printed on them?

A. Yes, I can give you that record.

1895 Q. Will you so indicate on this list that you prepare?

A. Yes.

Mr. Abbott: We now offer in evidence Exhibits "I" and "J" and "K." Exhibits "I" and "J" appear on page 40 of this record and Exhibit "K" on page 41 (pages 433 & 434 this B. of Ex.).

Mr. Sidner: Objected to as incompetent, immaterial, irrelevant, and no sufficient foundation laid.

Cross-examination.

By Mr. Sidner:

1896 Q. You don't pretend to say that you do all the printing for those banks in that territory, do you?

A. No sir.

1897 Q. As a matter of fact you do only a small portion of it?

A. A small portion? Not with some of them, no.

1898 Q. Some of them you do more than with others?

[fol. 426] A. Oh, yes.

1899 Q. And with a large part of them you only do part of the printing?

A. Yes.

1900 Q. You can't tell what part you do?

A. Oh no.

1901 Q. And the percentages you gave are based solely on the business or printing you did for them?

A. Yes; the only possible way we could get a record — be to take the amount of business and the amount of money they spend for supplies, and we could give you our records of the business we have done for them for the last ten years.

1902 Q. You gave percentages as to what appeared on these different jobs, that is based entirely on what you furnished?

A. Yes.

Redirect examination.

By Mr. Abbott:

1903 Q. Now Mr. Chappel, referring to those banks you testified that you visited from 1921 to 1925, in the territory you covered, you may state what, if anything you observed in the way of signs, "depositors in this bank are protected

by the guarantee fund of the State of Nebraska," and state what you observed in that connection?

Mr. Sidner: Objected to as incompetent, immaterial, irrelevant, no sufficient foundation laid, leading and sug- [fol. 427] gestive, and not limited to the banks involved in this controversy.

A. Yes, the signs were displayed on practically all the windows and inside at the cage with the above mentioned words.

1904 Q. Mr. Sidner: I move to strike out the answer as not responsive for the reasons contained in the objection.

1905 Q. Do you now recall any state banks that you visited in which those words did not appear conspicuously in some place?

Mr. Sidner: Objected to as incompetent, immaterial, irrelevant, no sufficient foundation laid, leading and suggestive, and not limited to the banks involved in this controversy.

A. No, I don't remember any particular bank, that is it was on the windows or it was on the cage or on the stationary, one place or another.

1906 Q. Now then you referred a moment ago to the percentage or degree to which the phrase was used on printed matter of the state banks; what was your observation in that regard as to the use on printed matter generally as to state banks?

Mr. Sidner: Objected to as incompetent, immaterial, irrelevant, calling for the conclusion of the witness, not the best evidence, and not limited to the banks involved in this controversy.

[fol. 428] A. At that time practically that went outside of the banks as checks, letter heads, that was distributed to the public for their use, that is of the customers, had that guarantee fund out, as we call it; I don't know how you can term it unless you take the remittance sheets and ledger sheets and stuff that was not used outside the bank that we did not use it on.

Mr. Sidner: I move to strike out the answer as not responsive to the question for the reasons contained in the objection.

1907 Q. Was there any bank that you now recall that did not use that phrase on some part of itw printed matter?

A. Not that I can recall; that is if you refer to state banks all the way through?

1908 Q. Yes.

(Signed) R. H. Chappel.

Ray W. Hammond, of lawful age, being by me first duly examined, cautioned and solemnly sworn, as hereinafter certified, deposeth and sayeth as follows, viz:

Examined by Mr. Abbott:

1909 Q. State your name and age?

A. Ray W. Hammond, forty-eight.

1910 Q. Where do you reside, Mr. Hammond?

A. Fremont, Nebraska.

1911 Q. How long have you been a resident of Fremont?

A. Forty-eight years.

1912 Q. What is you- occupation?

[fol. 429] A. Printer.

1913 Q. Manager of the Hammond Printing Co.?

A. Yes.

1914 Q. How long have you been identified with the Hammond Printing Co. in an executive capacity?

A. Twenty-five years.

1915 Q. What is the business of the Hammond Printing Co. and has been for the past twenty-five years?

A. Printing and publishing.

1916 Q. What newspaper, if any, does it publish?

A. The Fremont Evening Tribune.

1917 Q. And has been during all of that period?

A. Yes.

1918 Q. In connection with its printing business does it do a commercial printing business?

A. Yes.

1919 Q. Over what territory?

A. Nebraska and Iowa and several surrounding states.

1920 Q. How many employes do you have, Mr. Hammond?

A. Fifty.

1921 Q. As a part of your commercial printing business do you do any bank printing?

A. We do.

1922 Q. What is the nature of the bank printing you now do and have been doing for the past twenty-five years?

A. Counter checks, customers checks, certificates of deposits, letter heads.

1923 Q. Calling your attention to Exhibit "L-1" to "L-[fol. 430] 5" inclusive, you may state if you know whether the Hammond Printing Co. printed those particular exhibits?

A. They did.

1924 Q. Does the Hammond Printing Co. have traveling salesmen soliciting bank orders?

A. No.

1925 Q. Did you up to a few years ago?

A. Did up to about two years ago.

1926 Q. For how many years prior to two years ago?

A. Twenty-five years.

1927 Q. Calling your attention to the wording on these exhibits, "deposits in this bank are protected by the guaranty fund of the State of Nebraska," I will ask you for how many Nebraska State banks you have been doing printing for the last fifteen years upon which those words appear, that is checks and certificates of deposit and deposit slips?

A. I cannot answer that.

1928 Q. Could you approximate the number?

A. Two to three hundred.

1929 Q. Mr. Hammond, that wording or that insignia as it appeared on some of the stationary or some of the checks and drafts or certificates of deposit for all state banks, is that in common use?

A. It is in common use, yes.

1930 Q. Did you ever, to your knowledge, print any certificates of deposit or any checks for any state banks since the guaranty law went into effect upon which, at its request, you left off those words?

[fols. 431-435b] A. Yes.

1931 Q. Recently?

A. No.

1932 Q. What bank was that Mr. Hammond?

A. I don't remember.

1933 Q. Do you recall one instance?

A. No, I was just glancing through the samples and there were several in the file that did not have it on; I don't recall.

1934 Q. You mean several samples that did not have it on?

A. Yes.

1935 Q. You did not mean you had some specific request to leave it off?

A. No.

1936 Q. These particular exhibits "L-1" to "L-5", were they printed for the particular bank whose name appears on them, respectively?

A. Yes.

1937 Q. And delivered to them in quantities?

A. Yes.

1938 Q. Could you now state the dates when any of them were delivered?

A. No.

1939 Q. Within what period of time would you say they had been delivered?

A. Ten years.

1940 Q. Mr. Abbott: We offer in evidence Exhibits "L-1" to "L-5" (attached to page 435 this B. of Ex.).

Mr. Sidner: Objected to as incompetent, immaterial, irrelevant, and no proper foundation laid.

[fol. 436] 1941 Q. Calling your attention to Exhibit "D", you may state if you know who printed that pamphlet?

A. The Hammond Printing Co.

1942 Q. Were you familiar of the fact of the printing of it at the time it was printed?

A. I was.

1943 Q. Did you at that time have anything to do with the printing, the taking care of the order and the printing and delivering?

A. No.

1944 Q. It was under your direction? Were you familiar

with it at the time?

A. Yes.

1945 Q. Did you print a pamphlet similar to those for the State Bank of Omaha?

A. Yes.

1946 Q. In what respect, if any, did it differ from this pamphlet?

A. The three lines on the first page and the statement on the last.

1947 Q. The words, "compliments of the Fremont State Bank," the wording was different?

A. Yes.

1948 Q. And the state bank named on it, that is the State Bank of Omaha?

A. Yes.

1949 Q. You say the statement on the back, that was the statement of the State Bank of Omaha?

A. Yes.

1950 Q. Did you deliver a quantity of these to the State [fol. 437] Bank of Omaha, printed as you suggest?

A. Yes.

1951 Q. Did you have more than one order?

A. Yes.

1952 Q. You may give the dates and quantities that you delivered to the State Bank of Omaha?

A. December 4th, 1925, the date of the order was entered.

1953 Q. How many did you deliver on that order?

A. Two thousand.

1954 Q. About what time?

A. Delivered two or three days afterward.

1955 Q. What other orders?

A. January 25th, 1926, 2,000; July 7th, 1926, 2,000; January 5th, 1927, 2,000.

1956 Q. And what was done with those several quantities that you have referred to?

A. Shipped to the State Bank of Omaha.

1957 Q. This Exhibit "D" you have identified here, Fremont State Bank, do you recall how many of those you delivered?

A. 10,000.

1958 Q. Mr. Hammond, calling your attention to a newspaper purporting to be copies of the Fremont Evening

Tribune identified as Exhibits "N-1" to "N-10" inclusive, did you produce those papers here?

A. Yes sir.

1959 Q. What are those, if you know?

A. Copies of the Fremont Evening Tribune on the dates indicated on the respective exhibits.

[fol. 438] 1960 Q. Are those copies of the regular issue of the Tribune on those dates?

A. Yes sir.

1961 Q. Calling your attention to page eight of Exhibit "N-1", page ten of Exhibit "N-2", page ten of Exhibit "N-3", page ten of Exhibit "N-4", page eight of Exhibit "N-5", page ten of Exhibit "N-6", page ten of Exhibit "N-7", page ten of Exhibit "N-8", page six of Exhibit "N-9", and page twelve of Exhibit "N-10", purporting to be advertisements inserted by the state banks of Dodge county, that is enumerated state banks in some instances, you may state whether you are familiar with those advertisements and the insertion of them?

A. I am.

1962 Q. By whom were those several advertisements inserted?

A. By the twelve banks named and listed on Exhibit "N".

1963 Q. Were all of the advertisements contained in these papers I have identified here inserted by those respective banks?

A. Yes sir.

1964 Q. What issues of the Fremont Tribune of that date were they inserted in?

A. All issues.

1965 Q. And were the papers of that date distributed to your subscribers?

A. Yes.

1966 Q. Now during the period from September 11th, 1926, to November 3d, 1926, inclusive, both dates, who was the general manager of the Fremont Evening Tribune?

[fol. 439] A. I was.

1967 Q. Did you know at that time the circulation, the number of papers printed and circulated by the Fremont Evening Tribune, approximately?

A. Yes.

1968 Q. What was the circulation of the Fremont Evening Tribune, daily, during that period?

A. Approximately 7,000.

1969 Q. You may state in a general way the extent of that circulation in Dodge county?

A. About 5,000 in the county.

1970 Q. How many of those in Fremont?

A. 2,700.

1971 Q. Then there would be about 2,300 in Dodge county outside of Fremont?

A. Yes.

1972 Q. What is the present circulation of the Tribune, Mr. Hammond?

A. It is approximately 7,000, about the same.

1973 Q. Take it for the last ten years, what had been the minimum circulation during that period?

A. 6,000, I would say.

1974 Q. About the same ratio between Fremont and the balance of the county?

A. Yes.

1975 Q. In addition to your circulation in Dodge county, do you have any considerable circulation in adjoining counties?

A. Yes.

1976 Q. In what other counties do you circulate and what [fols. 440-450] towns particularly?

A. Washington County, Cuming County, Burt, Colfax, Saunders, Arlington, West Point, Schuyler, Cedar Bluffs, Wahoo, Leshara and Valley.

1977 Q. And has that been the condition during the past ten years as to the distribution of the circulation?

A. Yes.

[fol. 451] 1978 Q. Mr. Hammond, I am about to identify certain bound volumes of the issues of the Fremont Evening Tribune, and I ask you at the inception whether you are willing to let any of these volumes of these files be attached to the deposition and go out of your possession?

A. No.

1979 Q. Are there any duplicates?

A. No.

1980 Q. Mr. Hammond, calling your attention to the bound volume that lies open before you, you may state, if you know, what that book is?

A. Files of the Fremont Evening Tribune for the period from November 13th, 1922 to May 12th, 1923.

1981 Q. Are those issues of the daily Fremont Evening Tribune for that period?

A. They are.

1982 Q. How frequently was the Tribune published through that period?

A. Every day except Sunday.

1983 Q. Do you have available copies of these papers for this period other than this volume?

A. No.

[fol 462] 1984 Q. Are there such copies available that you know of?

A. No.

1985 Q. What was the circulation of the Fremont Evening Tribune through the period, approximately?

A. 6200.

1986 Q. How was the distribution of that circulation as compared to the distribution for other periods?

A. Less, ten per cent less.

1987 Q. It would be relatively the same, distributed the same?

A. Yes.

1988 Q. Calling your attention to the issue of Friday, February 2nd, 1923, and to the advertisement, three columns wide and the full length of the page, headed, "Community Service" at the top, and "Fremont State Bank" at the bottom who inserted that advertisement?

A. The Fremont State Bank.

1989 Q. Are you willing, Mr. Hammond to let this volume or any of the papers therein contained, be taken from your possession?

A. No.

1990 Q. Were all of the issues of your paper represented in the volume circulated to your regular subscribers during that period?

A. Yes.

1991 Q. Mr. Abbott. We offer in evidence the paragraph of this advertisement starting in, "Put your money in sav-

ings," and the third and bottom paragraph, "Let this make this community prosper," and ask that the reporter copy that.

[fol 453] Mr Sidner: We object to it unless the entire advertisement is offered in evidence. The advertisement in whole appears on the following pages.

Mr Fernean: It is agreed the part marked with a capital "A" on Page 67 1 and "B" on Page 67 2 is to go on this record only from Mr Hammond's deposition.

Copy of "A" in newspaper clipping is as follows:

If you put your money in our Savings D partment you will not only receive compound interest but also have absolute insurance. One thousand state banks are assessed by law for the purpose of protecting your deposits. You cannot lose a dollar in this bank by fire, flood, theft or failure.

Copy of "B" in newspaper clipping is as follows:

Let us make this community prosper by placing our surplus funds in our own banks for the use of our own people. We do not expect to get all of the people's money into the Fremont State Bank, although we have paid $11,000 the last year for the purpose of insuring our depositors against possible loss. This is the measure of safety offered our depositors for the sake of inducing them to patronize home industry where safety and profits are greatest by leaving their money here for the use of the people who are making the communits a fit place in which to live.

[fol 454] Mr Abbott: Defendants offer now the signatures to this advertisement just read and which was included in the deposition at the request of the plaintiff; that is on page 67 2.

Fremont State Bank. Dan V. Stephens, President; E. M. (Hap) Little, Ass't to president; Dave Rowe, Vice-President; J. M. Sorensen, Cashier; Wm. N. Mitten, Ass't Cashier; Edith Sterner, Mgr. Savings Dept.; George Gumb, Teller; Walter Planck, Teller; Helen Sanders, Teller; Urbin Shulz, Clerk; Guy Edloff, Clerk; Donald Tremain, Clerk.

[fol 455] 1992 Q. Challenging your attention to the issue of February 12th, 1923, and to the advertisement appear-

ing on page 2, three paragraphs, and signed Fremont State Bank, who inserted that advertisement?

A. The Fremont State Bank.

1993 Q. Are you willing, Mr. Hammond, to let this volume or any of the papers therein contained, be taken from your possession?

A. No.

1994 Q. Were all of the issues of your paper represented in this volume circulated to your regular subscribers during that period?

A. Yes.

Mr. Abbott: We offer in evidence the above mentioned three paragraphs.

Mr. Sidner: We object to it unless the entire advertisement is offered in evidence.

The above advertisement in whole appears on the following pages:

OFFER IN EVIDENCE

[fol. 456] Safety and Service

The Fremont State Bank has a purpose in its widespread efforts to serve the people of this trading center without regard to immediate profits. We have learned long ago that service is necessary before profit can be reached. We know that we can't escape reaping the profit if we wisely and efficiently serve.

So we sometimes violate a long respected rule of banking by loaning money to men who are engaged in useful enterprises even though their accounts are of no value directly to the bank. We do this upon the theory that they are doing a useful and necessary work and our bank should support them when it can safely do so and share indirectly the profits growing out of a larger community service.

This policy of serving promptly and efficiently and wisely, we hope, has brought the Fremont State Bank great success in a short time. Only two and a half years ago we started this comprehensive plan of service to the people with the result that our depositors have increased from 250 to about 4,400 and our deposits from $400,000 to $1,200,000.

It is a phenomenal growth at a period when most enterprises were suffering from deflation.

This growth, too, is sound and permanent as demonstrated by the steady climb in the number of customers being served and the increasing amounts placed at our dis- [fol. 457] posal. The depositors being so numerous and the amounts of their deposits small tends to permanency in dependable balance. We have few large depositors with fluctuating balances to exhaust our reserves unexpectedly.

For the safety of our depositors we keep the largest reserves probably of any bank in Nebraska outside the Reserve City banks. In addition to the actual cash reserve, we have always at hand Government bonds and other securities which can be turned into cash at a few hours' notice so there has been scarcely a day when we could not have paid our depositors in full by borrowing the additional sum needed without collecting a penny of the million dollars loaned to our customers.

There is probably not another million dollar bank anywhere that can honestly make such a claim.

Notwithstanding this unparalleled solvency and ability to meet all demands, we have the added safety of having our depositors protected by the Guaranty Fund of the State of Nebraska. Approximately a thousand state banks are taxed not more than 1-1/10 per cent a year if need be on their deposits of 220 millions, for the purpose of paying depositors in full in the event of failure.

This Guaranty Fund now consists of more than two millions in cash and eight millions in assets, making a total of resources belonging to the Guaranty Fund of ten million [fol. 458] dollars, available only for the security of depositors.

This vast sum is sufficient to pay all the depositors in fifty ordinary banks without collecting an additional dollar under the power of the state to levy a 1-1/10 per cent tax on deposits against the banks each year. It is the largest insurance fund available to pay depositors anywhere and available for State Banks only. National banks are not protected by this fund.

Then on top of all this security, we have all sorts of insurance on officers and property and against burglary and bank robbers.

This idea of safety and service is, in our judgment, what makes the Fremont State Bank grow so rapidly. We, therefore, rededicate ourselves to the cause of a better community which can only be made better by making its institutions sound and prosperous. We cannot be happy without being fed and comfortably housed and that takes capital which we must dig out of mother earth.

Those who like this idea of service will throw in with us, or we with them, and a greater and better community will result.

Let's go.

Fremont State Bank. Dan V. Stephens, President; E. M. (Hap) Little, Ass't to President; Dave Rowe, Vice-President; J. M. Sorenson, Cashier; Wm. N. Mitten, Ass't Cashier; Edith Sterner, Mgr. Savings Dept.; George Gumb, Teller; Walter Planck, Teller; Helen Sanders, Teller; Urbin Shulz, Clerk; Guy Edloff, Clerk; Donald Tremain, Clerk.

[fol. 459] 1995 Q. Mr. Hammond, referring to the volume for the period from May 14th, 1923, to November 13th, 1923, calling your attention to the advertisement as of date May 22nd, 1923, two columns wide, on page 2, headed "Safety First," and "Fremont State Bank" at the bottom, who inserted that advertisement?

A. The Fremont State Bank.

1996 Q. Are you willing to let this volume or any of the papers represented therein go out of your possession?

A. No.

1997 Q. Were all of the issues of your paper represented in this volume circulated to your regular subscribers during that period?

A. Yes.

Mr. Abbott: We offer the whole advertisement in evidence.

Mr. Sidner: Objected to as incompetent, immaterial, irrelevant and no sufficient foundation laid. The advertisement in whole appears on the following pages:

Offer in Evidence

[fol. 460] Safety First

Today the bankers in Nebraska are meeting in the various districts to choose a body of men from which the Governor will select the personnel of the Nebraska Guaranty Fund Commission. This action will conclude the preliminary steps in perfecting the Guaranty of Deposits law which has rendered the people of Nebraska a tremendous service during the recent money stringency when business failures were reported daily by the hundreds and banks failed here and there, our depositors were undisturbed because their money in our state banks was insured and could not be lost. The test of a great disaster proved it.

In brief, a practical, workable, mutual insurance company has been perfected that *that* absolutely protects the money of the people when placed in the state banks of Nebraska. It builds confidence, relieves the depositor and his family from worry over the safety of the nest egg they are adding to, bit by bit, for the building of a home of their own, and it will encourage the wary to bring their money out of hiding and put it to work. It develops faith in industry and inspires the farmer and business man to bigger enterprise. It will maintain prosperity.

Everybody appreciates the advantage of insurance in other fields as a safeguard of the people's wealth but never before has the public in any state, through a safe, sane and [fol. 461] practical law tested by years of hard knocks, been afforded the advantage of safe insurance where their money is concerned.

We are proud to be a part of this beneficial plan and are glad that we can offer the people of Fremont through our bank the protection the Nebraska Guaranty Fund affords.

Both our savings and checking accounts are included under this act, and their safety is given to you as a part of our service.

Remember that every dollar you deposit in this bank has in effect a dollar's worth of insurance backed by practically a thousand other banks. Nebraska has a wonderful banking system. It has no equal in all the states. It is better today than ever after a two-year deflation period when

financial disaster overtook large numbers of people, but not a single dollar was lost by a depositor in a state bank.

Deposits protected by the Depositors Guaranty Fund of the State of Nebraska.

Fremont State Bank. Dan V. Stephens, President; Hsp Little, Assistant to President; Dave Rowe, Vice-President; J. M. Sorenson, Cashier; W. N. [fol. 462] Mitten, Ass't Cashier; Edith Sterner, Managing Savings Department; George Gumb, Teller; Walter Planck, Teller; Helen Sanders, Teller; Urbin Shulz, Clerk; Guy Edloff, Clerk; Donald Tremaine, Clerk.

[fol. 463] 1998 Q. Mr. Hammond, calling your attention to the issue of June 30th, 1923, on page 2, to the advertisement appearing there in the last full column, who inserted that advertisement?

A. The Fremont State Bank.

1999 Q. And it went through the regular issues to the regular subscribers as of that date?

A. Yes.

2000 Q. What is its size?

A. One column by twenty one inches.

2001 Q. You may read into the record the wording?

A. "State Guaranty Fund Saving Bank, Four Per Cent on Time Deposits, Fremont State Bank, Deposits Protected by the Depositors' Guaranty Fund of the State of Nebraska. The State Guaranty Fund Commercial Bank."

2002 Q. Have you read it from top to bottom?

A. Yes.

2003 Q. Are you willing to let this book go out of your possession?

A. No.

Mr. Abbott: We offer the above in evidence.

2004 Q. Challenging your attention to the advertisement in the issue of November 14th, 1923, who inserted that advertisement?

A. The Fremont State Bank.

2005 Q. Are you willing to let this issue go out of your possession?

A. No.

2006 Q. And it went through the regular issues to the regular subscribers as of that date?

A. Yes.

Mr. Abbott: We offer in evidence the advertisements as [fol. 464] above mentioned.

Mr. Sidner: Objected to as incompetent, immaterial, irrelevant and no sufficient foundation.

The above mentioned advertisement appears in full on the following pages.

This is an error: no advertisement under this date.

[fol. 465] 2007 Q. Calling your attention to the advertisement in the issue of May 13th, 1924, who inserted that advertisement?

A. The Fremont State Bank.

2008 Q. Are you willing to let this issue go out of your possession?

A. No.

2009 Q. And it went through the regular issues to the regular subscribers as of that date?

A. Yes.

Mr. Abbott: We offer in evidence the above mentioned advertisement.

Mr. Sidner: Objected to as incompetent, immaterial, irrelevant and no sufficient foundation laid.

The above mentioned advertisement appears on the following pages:

This is an error: no advertisement under this date.

[fol. 466] 2010 Q. Mr. Hammond, calling your attention to the issue of Wednesday, September 5th, 1923, page nine, being an advertisement five columns wide and the full page in length, being twenty-one inches long, who inserted that advertisement?

A. The Fremont State Bank.

2011 Q. Are you willing to let this issue go out of your possession?

A. No.

2012 Q. And it went through the regular issues to all of your regular subscribers as of that date?

A. Yes.

Mr. Abbott: We offer the same in evidence.

Mr. Sidner: Objected to as incompetent, immaterial, irrelevant and no sufficient foundation laid.

The above mentioned advertisement appears on the following pages:

This is an error; no advertisement under this date.

[fol. 467] 2013 Q. Mr. Hammond, calling your attention to the issue of December 31st, 1923, an advertisement four columns wide and the full length of the page, headed with the words, "Rest in security," and signed by the Fremont State Bank, Dan V. Stephens, President," who inserted that advertisement?

A. The Fremont State Bank.

2014 Q. You may state for the record the size of the heading?

A. Three-quarters of an inch.

2015 Q. Calling your attention to the paragraph starting "Second Protection is Offered," what is the size of that particular paragraph?

A. Two inches.

2016 Q. And ten inches long?

A. Ten.

2017 Q. And the size of type to fill that space?

A. Yes.

Mr. Abbott: We offer in evidence that particular paragraph.

Mr. Sidner: Objected to as incompetent, immaterial, no foundation laid, and further object to it, it is only a part of the advertisement and in the event the plaintiff's objection is overruled, the plaintiff offers the balance of the advertisement identified by the witness in evidence. The above mentioned advertisement in full appears on the following pages.

[fol. 468] Mr. Abbott: Let the record show that the part of the advertisement offered in evidence is the part marked with a capital "C" on page 78 of Exhibit 17 and is as follows:

The second protection is that offered by the Guaranty Fund of the State of Nebraska to the depositors of this bank. The State of Nebraska collects assessments from all of the state banks of Nebraska, which assessment is used

to pay depositors, who lose their deposits through state bank failures. In the thirteen years that this law has been in effect, not a single depositor in a single bank in the state of Nebraska has lost one penny of the money he had on deposit in a bank that failed. Therefore, this insurance, carried by this bank at a very great expense, protects absolutely every dollar that is carried on deposit in this bank from loss. No greater protection for depositors can be offered than this.

[fol. 469] 2018 Q. Mr. Hammond, calling your attention to the issue of the paper that I have had marked Defendants' Exhibit "O," do you know what that is?

A. Apparently a tear sheet from the issue of November 7, 1925.

2019 Q. What do you mean by a tear sheet, Mr. Hammond?

A. A tear sheet is one sheet off the paper, two pages.

2020 Q. Do you identify this as a sheet of the paper of [fols. 470 & 471] your issue of the Fremont Evening Tribune of date, Saturday, November 7th, 1925?

A. Yes.

2021 Q. Is it such a sheet?

A. Yes.

2022 Q. And referring to the advertisement on this sheet of paper on the side marked page 9, headed, "Nebraska guaranty fund law for insuring deposits in banks," and ending with the words "Fremont State Bank, by Dan V. Stephens President," at the bottom, you may state, if you know, who inserted that advertisement in your paper?

A. The Fremont State Bank.

2023 Q. Did that go to all of the regular subscribers and to all of the circulation of the Fremont Evening Tribune of that date, Saturday, November 7th, 1925?

A. Yes.

2024 Q. The Fremont State Bank is in Fremont, Nebraska?

A. Yes.

Mr. Abbott: We offer in evidence Exhibit "O." Exhibit "O" is attached to the following page.

[fol. 472] By Mr. Abbott:

2025 Q. Mr. Hammond, calling your attention to the paper lying open before you, in the bound volume pur-

porting to be a copy of the Fremont Evening Tribune, Tuesday, January 17th, 1928, and to page five thereof, you may state what page — is?

A. Page five of the Fremont Evening Tribune of that date.

2026 Q. Is this particular paper one of your files, your bound files?

A. Yes.

2027 Q. Do you have available duplicate of these files?

A. No.

2028 Q. Challenging your attention to the advertisement seven columns wide and the full length of the page headed, "Bank Guaranty Law," on the first line and "New Method of Procedure," as the second line and in the form of a letter and at the bottom, "Fremont State Bank by Dan V. Stephens, President," that advertisement was inserted in the issue of that day?

A. Yes.

2029 Q. Who inserted that advertisement?

A. The Fremont State Brank, Fremont, Nebraska.

2030 Q. You may note that advertisements, as to what it is devoted to?

Mr. Sidner: Objected to as it speaks for itself.

A. It refers to the bank guaranty law.

Mr. Sidner: I move to strike all the testimony with reference to the advertisement for the reason that same is [fols. 473 & 474] incompetent, immaterial, irrelevant, unless the advertisement itself is introduced into evidence.

2031 Q. Calling your attention, Mr. Hammond, to Exhibit "P," purporting to be a copy of the Fremont Evening Tribune of date, January 25th, 1928, you may state what that is, if you know?

A. It is a copy of the paper of that date.

2032 Q. Of the regular issue?

A. The regular issue.

2033 Q. Was that circulated to all the subscribers of the paper?

A. Yes.

2034 Q. Challenging your attention to page five of the paper, the advertisement seven columns in width and about three-quarters of a page in length, headed, "More light on

the Bank Guaranty Law," did that advertisement run in all of the papers of the issue of that date?

A. Oh yes.

2035 Q. Who inserted that advertisement, Mr. Hammond?

A. The Fremont State Bank, Fremont, Nebraska.

Mr. Abbott. We ask that page five be detached, identified as Exhibit "P," and attached to the deposition as a part thereof. Said Exhibit is attached to the deposition as a part thereof. Said Exhibit is attached to the following page.

[fol 475] 2036 Q. Mr. Hammond, as to all of the newspaper advertisements you have identified in the various papers as inserted by the Fremont State Bank, you may state whether or not all of those advertisements went into the regular issues and were circulated to the subscribers of the Fremont Evening Tribune as of the dates of the respective publications?

A. They were.

2037 Q. How long have you been in the newspaper business, Mr. Hammond?

A. About twenty five years.

2038 Q. Did you personally know of the circulation of the Fremont Evening Tribune being approximately what you have testified to? You are the general manager of it?

A. Yes.

2039 Q. And familiar with this circulation and have been during this period?

A. Yes.

2040 Q. Do you know, Mr. Hammond, from your experience as a newspaper man and from your general education along that line, about how many readers, compared to circulation, adult readers, that is how many adult readers per copy on the average?

A. The general figure is four, that is the general figure that is used.

2041 Q. Referring to the pamphlet Exhibit "D," entitled on the outside "Compliments of the Fremont State Bank," and bearing the imprint of the Hammond Printing Co., did you print pamphlets about the same time as this exhibit for other banks, containing the same matter in the same

[fol. 476] form except as to the bank statement and the name of the bank?

A Yes.

204 Q About how many banks did you print that pamphlet for, Mr. Hammond, and deliver to the respective banks, and in what quantities?

A I should say there were twenty-five banks, using altogether 50,000.

Mr. Abbott: In view of the record and the objections made to the bank advertisement referred to as Exhibit "D" by counsel for the plaintiff asked on cross examination to have incorporated in full on account of the objection made, the defendants ask that the part introduced by them be not copied in.

Mr. Sidner: Plaintiff insists on the Exhibit being copied in full.

Mr. Abbott: Defendants give notice, that if it is copied in full, as far as the notary is concerned he is to look to the plaintiff for the expense of doing so.

Mr. Abbott: Defendants offer in evidence and ask to have attached and transmitted as part of this deposition all copies heretofore identified and introduced in evidence.

Ray W. Hammond.

It is stipulated that the deposition of R. H. Chappel was taken by consent of counsel for the plaintiff, his name not [fol. 477] having been included in the notice to take depositions.

I, Burnell Colson, of the county of Dodge and State of Nebraska being a notary public within and for said county, do hereby certify that Dan V. Stephens, J. M. Sorensen, R. M. Chappel and Ray W. Hammond, were by me severally duly sworn to testify the truth the whole truth and nothing but the truth, and that the depositions by them respectively subscribed as above set forth, were reduced to writing by myself, and were taken at the time and place as above set forth in the annexed notice specified; that I am not counsel, attorney or relative of either party, and that said depositions were commenced at the time in said notice specified and continued by adjournments from day to day as above stated.

In Testimony whereof I set my hand and notorial seal this 24th day of January, 1929.

Burnell Colson, Notary Public. (Seal.)

[fol. 478] The Rev J. C. Peterson, called as a witness on behalf of the defendants, after being duly sworn, testified as follows:

Direct examination.

By Mr. Sorenson:

2043 Q. State to the Court your name?

A. J. C. Peterson.

2044 Q. Where do you live, Mr. Peterson?

A. At Dannebrog, Howard County.

2045 Q. How long have you lived in Howard County?

A. Since 1892.

2046 Q. What has been your occupation?

A. Minister of the gospel.

2047 Q. Have you been a minister during all those years?

A. I have, yes.

2048 Q. Were you a depositor in any of the state banks which recently failed?

A. Yes, sir, in both of them.

2049 Q. Which ones?

A. In Boelus State Bank and also in the First State Bank of Dannebrog.

2050 Q. Are these banks now in the hand of a receiver?

A. They are.

2051 Q. Have you filed claims with the receiver of each bank?

A. Yes, sir.

2052 Q. Have the claims been allowed?

[fol. 479] A. They have, yes.

2053 Q. In what amount have your claims been allowed?

A. My major claim, $5,460.35 will be about $900 or $1,000.

2054 Q. How much did you have in the other bank?

A. $230.00.

2055 Q. About when did you deposit this money in these two banks?

A. In the First State, that small amount, I deposited probably in 1927.

2056 Q. When did you deposit the larger amount in the other bank?

A. At one time in June of 1920 I deposited quite an amount. I took out $3,000 of what I had——

Mr. Sidner: Object to any further testimony as incompetent, immaterial and irrelevant, showing he has been a depositor and that is all that is material.

The Court: He may give the date.

Exception.

A. 1920.

2057 Q. Did you renew your certificate from time to time?

A. I did.

Mr. Sidner: Object to this as incompetent and immaterial.

The Court: Overruled.

Exception.

2058 Q. What representations, if any, were made to you as to whether or not your deposits were protected at the time you placed your money in these banks?

Mr. Sidner: Objected to as incompetent, irrelevant and [fol. 480] immaterial, only binding on the parties to this suit, those referred to are not involved.

The Court: Overruled.

Exception.

A. I was told by the bankers and by people interested in the bank, directors, etc., that the money was perfectly safe, that it was guaranteed by the State Guaranty Fund and that if the bank should fail it would only be a matter of thirty to sixty days until I could have my money out.

2059 Q. Was your attention called to any advertisements and signs in the banks?

A. It was.

2060 Q. What was it?

A. They had signs similar to those read a minute ago advertising the Guaranty Fund and the safety of the depositors' money and that had quite an influence on me in

leaving my money because I believed in these signs and advertisements. They had signs in both banks and some are there yet.

2061 Q. Describe the signs to the Court.

A. Your Money is Guaranteed by the State Guaranty Fund of Nebraska. The signs that are displayed and they are there yet, in the First State Bank, at least. The others have taken it out and on their checks that has been printed, the same thing.

2062 Q. Do you have one of those checks with you?

A. I have one here; I have lots of them.

2063 Q. Handing you exhibit 18 I will ask you what that is?

A. This is a check I have drawn on the First State Bank [fol. 481] of Boelus and in the corner here it says: "Deposits are Guaranteed by the Guaranty Fund of the State of Nebraska."

2064 Q. Was the form of this check furnished by the Bank?

A. It was, yes, sir.

Mr. Sorenson: We offer in evidence Exhibit No. 18.

Exhibit No. 18 received in evidence, is made a part of this Bill of Exceptions, and is attached at page 490 hereof.

2065 Q. You said you read some advertisements about the Bank Guaranty Law?

A. I did.

2066 Q. State what you read?

A. I couldn't just exactly tell what the whole contents was.

Mr. Sidner: Objected to as not best evidence, no sufficient foundation laid.

The Court: Sustain the objection.

Exception.

2067 Q. In what papers did you see these advertisements?

A. In the Omaha Bee.

2068 Q. Do you recollect any other papers?

A. The Fremont Tribune.

2069 Q. The Omaha Bee was one paper?

A. Yes.

2070 Q. And the other was the Fremont Tribune?

A. Yes.

2071 Q. Did you hear some of the advertisements from [fol. 482] the Fremont Tribune read this afternoon?

A. Yes.

2072 Q. Were those some that you read?

A. Some of them were; there was one about depositors not losing a cent, I remember that especially.

2073 Q. You read that?

A. Yes.

2074 Q. And you say that appealed to you?

A. It did.

2075 Q. Did you believe these signs and statements on checks and advertising to be true, with reference to the Guaranty Fund?

A. I sure did.

2076 Q. Did you rely on those representations in making the deposits in those banks?

A. Yes, sir.

Mr. Sidner: Object to this as immaterial.

The Court: Overruled.

Exception.

2077 Q. Would you have made these deposits but for the representations about which you testified?

Mr. Sidner: Same objection.

The Court: Overruled.

Exception.

A. No.

Mr. Sorenson: You may cross-examine.

Mr. Sidner: No cross-examination.

[fol. 483] Cross-examination.

By Mr. Hotz:

2078 Q. Mr. Peterson, you live there and have for quite a number of years and are acquainted with many depositors in that community?

A. Yes.

2079 Q. Are you able to state from your own personal knowledge whether the condition of which you testified

here, where you deposited money in the banks and left it there, was the general condition with other depositors?

Mr. Gaines: Objected to as calling for opinion and trying to get the status of the minds of other people.

The Court: Sustained.

Exception.

2080 Q. Do you know, of your own personal knowledge, how some of the other depositors you came in contact with in your business acted with reference to this matter?

Mr. Gaines: Objected to as incompetent, immaterial and irrelevant, he couldn't know.

The Court: Objection overruled.

Exception.

A. Yes, I know of several. I could mention a widow out there——

Mr. Gaines: Objected to as already having been answered.

The Court: Sustained.

Exception.

2081 Q. Your business as minister of the gospel, you come in contact with a large number of people, do you not?

A. Yes, sir.

[fol. 484] 2082 Q. Have you ever been present where other depositors have discussed with yourself in the presence of bank officials or representatives the question of their funds being safe and to leave them there on deposit?

A. No, I couldn't say that.

2083 Q. Mr. Peterson, Prior to the time these banks failed, that is were taken over by the Guaranty Fund Commission, was there any rumors in the community that they were going to fail?

A. No, I don't know that.

Mr. Hotz: That is all.

By Mr. Sorenson:

2084 Q. Do these deposits in these two banks represent your life earnings?

Mr. Sidner: Objected to as incompetent, irrelevant and immaterial.

The Court: Sustained.

Exception.

2085 Q. You stated you read advertisements in the Omaha Bee. Calling attention to Exhibit 13 and the exhibits attached thereto I will ask you to state if those were the advertisements which you read?

A. No.

2086 Q. Did you read exhibit No. 27 attached to Exhibit No. 13?

A. I did read that.

Mr. Sorenson: That is all.

By Mr. Sidner:

2087 Q. Were there any banks in Dannebrog other than state banks?

[fol. 485] A. No, sir.

Mr. Sidner: That is all.

By Mr. Hotz:

2088 Q. Have all the banks in Dannebrog failed?

A. Yes, sir, the two we had failed. We have a new one going now that was organized afterwards.

2089 Q. When was that started, about how long ago?

A. That is last spring, a year ago this spring.

2090 Q. And does it have signs on its windows, the same as the others?

A. No, they took them down.

By Mr. Sorenson:

2091 Q. As I understand it, you renewed your certificate from time to time after reading this advertisement and other advertisements?

Mr. Sidner: Object as incompetent, immaterial and irrelevant.

The Court: He may answer.

Exception.

A. I did.

Mr. Sorenson: That is all.

Witness excused.

Mr. Carl M. Jorgenson, called as a witness on behalf of the defendants and duly sworn.

[fol. 486] Witness withdrawn.

Colloquy Between Court and Counsel

Mr. Sidner: If the court please, plaintiffs ask that a ruling be entered fixing the number of witnesses that may be called on this matter now under discussion. The Court has that power, to fix the number of witnesses that may be called.

The Court: Is that satisfactory to both sides?

Mr. Gaines: Due to the fact that an immense number of witnesses could be called on this same proposition——

Mr. Abbott: Let the record show this: In the matter of the First State Bank of North Bend, The Scribner State Bank and the Dodge State Bank and the Scribner State Bank, which banks are included with other banks in the advertising published in Dodge County, it is the purpose of the Defendants to produce about four witnesses to show that they read and relied upon those advertisements and as relying thereon deposited money in those particular banks. If counsel is willing now to stipulate as to those four witnesses we will be glad to forego bringing them here.

Mr. Sorenson: We are only interested in calling to testify, to bring such number of depositors to testify as will show beyond a doubt that the depositors generally over the state relied upon representations with reference to the [fol. 487] Guaranty Fund, namely that the deposits were protected by the State of Nebraska, and they relied on those representations, made deposits in those banks which otherwise they would not have made.

Mr. Campbell: As to the intervenors, it is not their purpose to unnecessarily encumber the record and if the num-

ber of witnesses is limited by the Court, the intervenors will be willing to treat the witnesses of the defendants as their witnesses and thereby cut down the number. The intervenors are also willing not to produce the intervenor's witnesses who have not taken the stand if there is a stipulation that they made their deposits upon representations of the banks in which they had their funds when the banks were taken over by the Guaranty Fund Commission.

The Court: I have some doubt about my power to enforce such a rule. I understand thoroughly that if it was a question of proving the value of a piece of real estate I could limit the number who could testify as to its value but I am not sure this is that kind of a proposition. I will overrule the matter for the present and we will go ahead this afternoon.

Exception.

[fol. 488] By Mr. Sorenson:

Stipulation

It is stipulated and agreed by and between the parties to this action that the Defendants have in court and on the way twenty-five depositors from different banks in the state, engaged in different occupations, who were depositors in different state banks now in the hands of receivers and that each and all of these depositors have adjudicated claims that are final and unpaid and ordered paid by the courts out of the Depositors' Guaranty Fund; and that these witnesses, if called to the stand, would testify as follows:

1. That prior to depositing their money in said state banks the officers of the said state banks made the same representations to them with reference to the Guaranty Fund as the witness Peterson testified were made to him by the officers of the banks in which he had deposited his money and that they read the same advertisements as Peterson testified that he read and that the said banks displayed the same signs and printed matter as Peterson testified were displayed by the banks in which he deposited his money.

2. That these depositors relied on said representations by state bank officials and on said advertisements and signs and printed matter and would not have deposited their money in said state banks but for said representations and advertisements and signs and printed matter.

3. That said witnesses are in the same situation as the witness Peterson with reference to their respective deposits and banks.

4. That the evidence of said twenty-five witnesses shall [fols. 489 & 490] be treated the same as though they had been present in court and testified to the effect.

5. That the witness fees of those present of said twenty-five witnesses shall be taxed the same as though they had been sworn and testified.

Mr. Gaines: To which offer the plaintiffs object as immaterial.

The Court: Overruled.

Exception.

Mr. Abbott: It is further stipulated that the Defendants are able to produce four witnesses from Dodge County who are depositors in the First State Bank of North Bend, now in the hands of the Guaranty Fund Commission and ordered by the District Court into receivership. And that they severally have deposits in said bank, made while it was a going concern and under circumstances similar to those of the witness Peterson and that the testimony of such witnesses is to be considered as offered the same as if they had personally appeared and testified.

Mr. Gaines: Object as immaterial.

The Court: Overruled.

Exception.

Mr. Campbell: It is stipulated that the above stipulations shall apply to Intervenors and be treated and considered as evidence on our behalf, subject to the objections made.

[fol. 491] Mr. Albert L. Schantz, called as a witness on behalf of the intervenors, having been previously sworn, testified as follows:

By Mr. Hotz:

2092 Q. You are the same Mr. Schantz that testified this morning on behalf of the plaintiffs?

A. Yes.

2093 Q. Your bank in Omaha was chartered when, what year?

Mr. Gaines: Objected to as already stipulated; the date is in the petition.

The Court: Overruled.

Exception.

A. 1912.

2094 Q. And it started out then as a new bank?

A. Yes, sir.

2095 Q. And its deposits, between that date and this, have grown up to what amount?

A. The last call shows about $5,700,000.

2096 Q. And Mr. Schantz, your bank -as shown then good progress and has shown substantial growth since 1912?

A. In 1913 we took over the State National Bank and the deposits of that bank were $2,200,000.

2097 Q. And aside from that there has been no consolidation that would increase the deposits, just the usual growth?

A. Just the usual growth as shown by other banks.

2098 Q. Your bank you consider as being in sound financial condition at the present time?

[fol. 492] A. We hope so.

2099 Q. Is it?

A. We think so.

2100 Q. And you are president of that bank?

A. Yes, sir.

2101 Q. And also manager in active charge of its affairs?

A. Active president.

2102 Q. In the City of Omaha, we have a population, as you know, of approximately 215,000 people. How many state banks in the city of Omaha, proper?

A. In the City of Omaha, eight national banks and seven state banks.

2103 Q. I am speaking of Omaha proper, and not including the suburbs, they are not a part of the city of Omaha, the down town part.

A. What you would call down town banks, you have five national banks and two state banks.

2104 Q. Your bank and the Union State Bank is the other state bank?

A. Yes, sir.

2105 Q. And you say five Nationals?

A. Yes.

2106 Q. And in South Omaha how many State Banks?

A. One state bank and one savings bank.

2107 Q. And how many nationals?

A. Four nationals.

2108 Q. And then there is the State Bank at Benson?

A. Yes, sir.

2109 Q. And one at Florence?

[fol. 493] A. Yes, sir.

2110 Q. And are there any more?

A. That is all that I know of.

2111 Q. There were two other state banks in the City of Omaha, down town banks, during the course of the period from 1912, but they have gone out of business?

A. There were two more state banks and three more national banks that have gone out of business.

2112 Q. And that has been during what period of time?

A. I think those banks have gone out of business since 1920.

2113 Q. Your bank, you would say, has prospered under present conditions, including and taking into consideration the Guaranty Fund Law? Is that true as a whole from 1912 on?

A. We have been able to pay dividends since 1913. We have no undivided profits outside of that.

2114 Q. But in spite of the Guaranty Fund you have been able to pay dividends and increase your deposits up to approximately, between five and six millions?

A. When you speak of deposits you are speaking of my liabilities and I don't know whether you consider that prosperous or not.

2115 Q. You consider your bank in a prosperous condition at the present time?

A. We consider our bank in a sound condition at the present time.

Mr. Schantz: I would like to correct my statement as to the number of down town national banks in Omaha; there [fol. 494] are only four.

2116 Q. In the event that this petition of yourself and of the other plaintiffs were dismissed and the temporary restraint against the taxing authorities of the State were removed, would you pay this assessment and continue to do so, or have you other plans

Mr. Gaines: I don't think that is material. A man should not be asked to testify as to what he may do on the outcome of a law suit.

The Court: Objection sustained. Exception.

Mr. Hotz: Strike out the question.

2117 Q. The thing I have in mind, Mr. Schantz, is this paragraph of the petition: "That the said special assessment and the assessments provided for in Section 8028 as amended, if paid by this bank and the other state banks of Nebraska will destroy the state banking system in a few years and compel such state banks as can to become national banks and the others to liquidate": in the event the court should hold this assessment is payable is it your intention to pay the assessment or not?

Mr. Gaines: Objected to as calling for an opinion of witness as to whether he will obey the order of the court. I don't think that is a proper question. It is objected to as calling for the opinion of the witness with rsepect to the effect of the decision of the court and dependent upon a decision of the court.

The Court: Objection sustained.

Exception.

[fol. 495] Mr. Hotz: That is all.

Mr. Gaines: That is all.

Further cross-examination.

By Mr. Abbott:

2118 Q. You stated, Mr. Schantz, you made reference to your earnings and to the present undivided profits; what

was the aggregate amount of dividends you declared during the years 1918 to 1928, inclusive?

A. My deposition shows that, I am not prepared to give it now.

2119 Q. I am at liberty to read your deposition?

A. Yes, sir.

2120 Q. Very well, I don't care to cross examine if I am at liberty to read the deposition. You referred to your having no undivided profits. Now in addition to the dividends you have declared during the period you have added $112,500 to surplus, haven't you?

A. My deposition shows that; whatever it shows I gave you from the books.

2121 Q. It isn't, that is, you won't testify except from the books?

A. I don't carry that in my memory.

Mr. Abbott: That is all, Mr. Schantz.

Witness excused.

[fol. 496] Mr. Abbott: We offer in evidence the deposition of W. B. Hughes taken in Omaha on Thursday, January 24th and filed in this Court on January 28th, 1929 and opened at the request of the Defendant on the same date.

Mr. Gaines: Plaintiffs object to the reading of the deposition for the reason it was not on file within the time required by statute. The statute says it must be filed before the trial.

Mr. Abbott: I might make the suggestion that there has been no objection filed heretofore to it.

The Court: The statute seems to be plain, gentlemen.

Mr. Abbott: Defendants challenge the court's attention to the fact that the deposition has been on file since January 28th, with no objection made up until this time to the filing nor to its use as evidence in this case.

The Court: As I see it now, the statute is plain, I don't see how we can get around it. Objection sustained.

Exception.

The Deposition of Mr. Hughes is copied herein and made a part of this Bill of Exceptions on the pages immediately following.

[fol. 497] Clarence G. Bliss, called as a witness on behalf of the intervenors, having been previously sworn, testified as follows:

Direct examination.

By Mr. Campbell:

2122 Q. I want to find out from you, Mr. Bliss, the practical operation of your Department up there on one point: do you or the Governor have anything to do with the administration of the assets of the Guaranty Fund at all?

A. You mean the Guaranty Fund Commission?

2123 Q. Yes, the Guaranty Fund Commission.

A. I would say not: not in a general way; the only position I have is chairman ex officio of the commission when their board is in session.

2124 Q. But the collection of the assets and the sale of the assets of all the failed banks that are turned over are administered and handled entirely and exclusively by the Guaranty Fund Commission?

A. Yes, sir.

2125 Q. Now, what part do you play in connection with collecting this assessment?

Mr. Gaines: Objection, as the law governs.

The Court: He may answer.

Exception.

A. The banks report twice a year, the total deposits that they have subject to assessment of the Guaranty Fund. Then the Department makes the levy and mails it out separately to each bank, instructing them to credit the amount of the levy upon their books to the credit of the Guaranty Fund.

2126 Q. And then the Guaranty Fund Commission draws?

A. No.

2127 Q. How, then, is that money got in?

[fol. 498] Mr. Gaines: I want to object to interrogating the witness with respect to the law on which his Department is operated.

The Court: He may answer.

Exception.

A. When the money is credited in these banks to the Guaranty Fund the usual practice is to draw drafts on all the banks.

2128 Q. Who draws the drafts?

A. Through our Department.

2129 Q. When you say Department, you mean the Department of Trade and Commerce?

A. The Department of Trade and Commerce draws drafts through some bank for all this money and we generally—that would bring the money to this particular bank where we draw the draft through.

2130 Q. And then, what do you do?

A. Our Department makes up checks on this account, payable to the receivers in the various banks where we have court orders ordering us to pay it.

2131 Q. And you turn it over to those receivers?

A. Yes, sir.

2132 Q. Is there any money from the assessments turned over to the banks operated by the Guaranty Fund Commission?

A. There would be under the statute in connection with the conservation fund.

2133 Q. But not the regular or special assessments?

A. No.

2134 Q. Now, are these receivers of these state banks [fol. 499] named and designated by the Department of Trade and Commerce or are they named and designated by the Guaranty Fund Commission?

A. Named by the Commission and approved by the Governor.

2135 Q. Now then, how is this money paid out to depositors? What is the custom in regard to priority, who is paid first and who is last, from a matter of practice, in the Department, if you know?

A. We have always undertaken to follow the order of the filing of the court orders in our Department.

2136 Q. And upon whom, upon what fund do the receivers draw the money, the Guaranty Fund Commission account?

A. The Guaranty Fund, as I testified to formerly, that same fund we collect from the banks is the only fund there is available for that purpose.

2137 Q. Now for instance, take this case: suppose the Guaranty Fund Commission sold real estate for a million

dollars, or notes or other assets for a million dollars, would you have anything to do with the handling of that money, would it come through the Department of Trade & Commerce?

A. In their going banks, if that would be in a going bank the commission would receive that money in their bank as sale of assets and they would pay it out pro rata to all depositors in that particular bank, that would not go into our Department.

2138 Q. The handling of all the assets of the Guaranty Fund Commission is a separate matter of their own?

A. Practically so.

2139 Q. Over which you are in no way responsible, nor [fol. 500] do they give bond covering that?

A. No, sir.

2140 Q. You say that the depositors in failed banks have been paid off in the order of the appointment of the receivers by the courts?

A. The order of the filing with the Department of the court order, yes.

2141 Q. Whenever that comes in?

A. Yes, sir.

2142 Q. And that is the practice you are still maintaining?

A. Up until now.

2143 Q. When was the last money paid out to depositors?

A. The actual depositors that have been paid off last was paid through the sale of receivership certificates and we are still paying receivership certificates from assessments on banks.

2144 Q. In other words, the money is going to pay receivership certificates rather than to pay depositors?

A. Yes.

2145 Q. There is about $167,000 left to those receivers certificates?

A. There was prior to this last assessment in January.

2146 Q. What has been the custom in the Department as to the amount that was paid to the depositors on the claims that have been allowed, so far as interest paid is concerned, and the rate?

Mr. Gaines: Objected to as immaterial and incompetent.

The Court: He may answer.

Exception.

[fol. 501] 2147 Q. As for your handling it, that is, if you know?

A. There hasn't been any claims paid that I am familiar with only as ordered by the court; there must be a court order and that isn't made to our department, it is through the receiver.

Cross-examination.

By Mr. Abbott:

2148 Q. If I understand you, Mr. Bliss, depositors in banks are paid in the order of the priority of the certificate that the court makes as to the payment?

A. That has been our custom.

2149 Q. And has prevailed during the whole course?

A. Yes.

2150 Q. In other words, it doesn't make any difference as to when a bank failed or the receiver was appointed, you pay the court order, the one that is received first, first, and the second court order you pay second, etc.?

A. That's been the only way the Department had of knowing the amount of loss to be paid.

2151 Q. Do you remember the last time the depositors were paid, or any payment was made on these court orders?

A. The last ones would be paid when the Commission sold Guaranty Fund Certificates and paid them in that way.

2152 Q. When was that?

A. I couldn't tell you.

2153 Q. Approximately a year ago or two years ago? [fol. 502] It was April, 1927, wasn't it?

A. I couldn't tell you without looking it up.

2154 Q. Do you know how old those claims were when paid by the proceeds of the receivers' certificates?

A. I presume one of the most—that is, the bank that failed and was paid the soonest, out of any banks that have been paid recently, was Papillion, by reason of the bank being placed in receivership soon after it was closed. The order came through, which was allowed by the court, and receivers' certificates were sold and the proceeds from the certificates was used to pay off those depositors and the depositors in that bank probably were paid off quicker than any of the other banks that I recall.

2155 Q. Does your office show when these receivers' certificates were sold?

A. Yes.

2156 Q. Can you give me that information in the morning?

A. Yes.

Mr. Abbott: That is all.

Redirect examination.

By Mr. Hotz, for intervenors:

2157 Q. During the years 1925, 1926 and 1927 the total levies paid to the Guaranty Fund Commission were approximately $1,600,000 in round figures, per annum and for the half year of 1928 was approximately half that amount, $885,000. I notice there has been refunds to the Guaranty Fund, total refunds to the Guaranty Fund in 1928, $257,- [fol. 503] 716.76. Now what is that fund, that $257,000?

Mr. Gaines: Object to interrogating witness as to some memorandum that has not been offered in evidence.

2158 Q. From your own recollection, Mr. Bliss?

A. You refer to refunds made to the Guaranty Fund?

2159 Q. Yes, what is that?

A. I don't—the statute provides that in a receivership bank, where depositors have been paid off by the sale of Guaranty Fund certificates, that its assets, when sold and realized upon, shall be refunded to the solvent banks. Therefore, when the Commission gets some money in that way they turn it over to our Department to be refunded pro-rata to the solvent banks in the state.

2160 Q. And from your recollection how much was turned back in 1928, if you recall?

A. I don't recall.

2161 Q. Within a few thousand?

A. I can't guess on it.

2162 Q. Is it $250,000?

A. I couldn't say, there are so many figures connected with it.

2163 Q. Handing you this paper, which I have had the court reporter mark Exhibit 19, I will ask if those figures were compiled by you, or under your supervision?

A. Yes, sir.

2164 Q. Now again calling attention to the item of refunds in the year 1928, can you give us any enlightenment [fol. 504] as to the amount?

Mr. Gaines: Objected to as immaterial and referring to an exhibit not in evidence.

The Court: Overruled.

Exception.

A. The files of the Department disclose that $257,716.76 were the total refunds to the Guaranty Fund during 1928.

2165 Q. And that amount of money was paid back to the solvent banks of the state?

A. Yes, sir.

2166 Q. During the year 1928?

A. Yes, sir.

2167 Q. And that reduced the amounts, the net amount that was paid by solvent banks from $885,412.60 to that figure less $257,716.76; is that right?

A. No, sir.

2168 Q. Then put us right on that score.

A. The levies paid to the Guaranty Fund are fixed by the statute at .6%, the regular plus the special, and this refund to the Guaranty Fund is in addition to that. You might note that the total drafts against the Guaranty Fund are over a million dollars, which is the $800,000 plus this refund, making a total of over a million dollars that has been paid out.

Whereupon an adjournment was taken until 9:30 o'clock a. m. the following day, February 6, 1929.

[fol. 505] Wednesday, February 6, 1929, 9:30 o'clock a. m., court convened and trial resumed pursuant to adjournment.

Mr. Clarence G. Bliss, a witness heretofore called and duly sworn on behalf of the intervenors, resumed the stand and testified as follows:

By Mr. Hotz:

2169 Q. Mr. Bliss, in the Exhibit =1 that was introduced here in evidence, the testimony of Mr. Peterson and the Exhibit shows that the total book value of all the assets of the Guaranty Fund Commission are $39,531,605.93. Are any of those funds or assets that go to make up that liability under your direction or control or do you have anything to do with the regulating or distribution of that fund, that is, your Department?

A. No, sir, only as that Department would refund that to us to be refunded to the banks as the statute requires.

2170 Q. In the event that there was more realized from the assets than the claims of the depositors against the fund?

A. Yes, sir.

2171 Q. That would be it?

A. Yes, sir.

Mr. Hotz: That is all.

Witness excused.

[fol. 506] Mr. Abbott: We offer in evidence the deposition of Albert L. Schantz taken in Omaha on the 18th of January and thereafter filed in this court. Filed in this court on January 23, 1929.

The deposition, which was marked Exhibit 13, received in evidence, read to the Court by Mr. Ferneau, made a part of this Bill of Exceptions and is attached at page 199 hereof.

Mr. Abbott: We offer in evidence the article in the pamphlet by Dan V. Stephens and will offer and read the whole pamphlet afterwards but we offer the Stephen's article now.

The article, which was contained in a pamphlet attached to Exhibit 13, was received in evidence, read to the Court and made a part of this Bill of Exceptions, being attached at page 268 hereof.

Mr. Sidner: I suggest you read the entire pamphlet.

Mr. Abbott: We offer in evidence the article from the Bankers' Association Journal and Mr. Stephen's reply.

[fol. 507] The Article from the Bankers' Association Journal and Mr. Stephens' reply received in evidence, read to the Court by Mr. Ferneau and made a part of this Bill of Exceptions, same being a part of Exhibit #13, and is attached at page 268 hereof.

Mr. Gaines: There is no objection to reading Mr. Stephens' deposition, rather than calling him to the stand.

Mr. Abbott: Defendants offer in evidence the deposition of Dan V. Stephens contained in Exhibit #17.

Exhibit #17 received in evidence, read to the Court by Mr. Ferneau, made a part of this Bill of Exceptions and attached at page 388 hereof.

Mr. Dan V. Stephens, called as a witness on behalf of the defendants, having been previously duly sworn, testified as follows:

By Mr. Abbott:

2172 Q. Mr. Stephens, handing you exhibit #20 you may examine and state, if you know, what it is?

[fol. 508] A. Yes, sir.

2173 Q. You may state?

A. That is a published advertisement of the Fremont State Bank at the beginning of 1928.

2174 Q. And is that statement a correct reflection of the deposits of your bank for the periods stated in it?

A. Yes, sir, that is a copy of our annual statement, the total deposits as shown in our annual statement.

2175 Q. That Exhibit received large publicity through the newspaper?

A. It was run in the Fremont Daily Tribune.

Mr. Abbott: We offer in evidence Exhibit #20.

Mr. Sidner: No objection.

Exhibit #20 received in evidence, read to the Court by Mr. Abbott, and is made a part of this Bill of Exceptions, and is attached at page 518 hereof.

2176 Q. Mr. Stephens, Were those deposits added to during that time, during that ten year period, by consolidation or otherwise than the ordinary, usual growth?

A. No, sir.

2177 Q. Was there any other state bank in Fremont during those years?

A. No, sir. Pardon me, there was a savings bank under a state charter, not a commercial bank.

2178 Q. What commercial banks were there?

[fol. 509] A. The Fremont National and the Union National, part of the time, at present.

2179 Q. During the period that you were making the growth shown by this exhibit, doubling your deposits about five times, what was the relative growth of the National banks during that same period?

A. As I recall the figures, the Fremont National's deposits grew from approximately $800,000 to $1,650,000; those are just rough estimates.

2180 Q. And the other bank?

A. The Union National was organized in 1921.

2181 Q. Take it from the period 1921 down to 1927, inclusive.

A. I think the Union National's deposits have not increased.

2182 Q. Now this statement of yours—— (witness interrupts)

A. The Union National's deposits, roughly speaking, were at the last statement, about $1,540,000 and they were approximately that soon after the bank was organized in 1921.

2183 Q. It was a consolidation of other banks?

A. A consolidation of other banks.

2184 Q. Now, referring to the time when you ceased to receive public deposits without giving bond; as I recall on taking your deposition one of you, Mr. Sorenson, stated that that had been within the last six months but that doesn't seem to have gotten into the deposition. Is that correct?

A. Of course, I don't handle those details but I recall that we started put-ing up liberty bonds to secure county and [fol. 510] city deposits, it seems to me about a year ago. I am only approximating the date.

Mr. Abbott: That is all.

Cross-examination.

By Mr. Sidner:

2185 Q. Mr. Stephens, you became associated with your bank in July, 1920?

A. Yes, sir.

2186 Q. Can you tell us approximately what the deposits were at that time?

A. About $375,000.

2187 Q. And when was the bank chartered?

A. In 1904, as a savings bank.

2188 Q. What were your deposits on December 31, 1928?

A. A million, seven hundred eighty-seven thousand, approximately.

2189 Q. How were the increase of deposits in that bank from the time it was chartered until the time you went in?

A. From the time the bank was chartered it grew to approximately $375,000 or around $400,000 up to 1920, when I took charge of the bank.

2190 Q. Do you know how much it grew from 1909 to 1920, when you took it over?

A. I would say about $150,000.

By Mr. Abbott:

2191 Q. When was the savings bank converted to a commercial bank?

A. In 1914.

[fol. 511] By Mr. Sidner:

2192 Q. So that in eleven years before you took it over, under the operation of the Guaranty Fund Law those deposits only increased $150,000?

A. Approximately that.

2193 Q. But after you took it over they grew from $375,000 to $1,787,000, is that correct?

A. That is approximately correct.

2194 Q. In eight years?

A. Yes, sir.

Redirect examination.

By Mr. Abbott:

2195 Q. It was after you took it over, Mr. Stephens, it got its publicity?

A. Well, it had some publicity. (Laughter.)

2196 Q. Before you took it over it had been a small bank operated in connection with a building and loan association?

A. It was a small bank but operated no more in connection with a building and loan association than now.

2197 Q. It was then managed by an officer of the building and loan association.

A. And it is now.

2198 Q. Before you took it over it was actively managed by the active manager of the building and loan association, is that right?

A. And it is yet.

[fol. 512] 2199 Q. Now it is actively managed by Mr. Sorenson and yourself. You are not actively connected with the building and loan association.

A. The president of the building and loan association sits every day on the board, as active as I am.

2200 Q. You and Mr. Sorenson are the active men in active control of the Fremont State Bank, are you not, Mr. Stephens?

A. Mr. Rowe, President of the building and loan association is vice president and active officer with Mr. Sorenson in the bank, sits on the board every day.

2201 Q. What is Mr. Sorenson's salary?

Mr. Sidner: Object to that as immaterial.

The Court: Sustained.

Exception.

Cross-examination.

By Mr. Campbell, for intervenors:

2202 Q. Is your bank in a sound and healthy condition?

A. It certainly is.

2203 Q. It has prospered during the last eight years?

A. It has.

2204 Q. As a bank?

A. Yes, sir.

2205 Q. And is prospering now?

A. Yes, sir.

2206 Q. And is at this time the largest bank in the city of Fremont?

[fol. 513] A. Yes, sir, measured by deposits.

2207 Q. When did it become the largest bank, measured by deposits?

A. Two or three years ago.

2208 Q. And it has paid all its Guaranty Fund assessments up until the one of December 15, 1928?

A. Yes, sir, and it has paid the last one, the last regular assessment.

2209 Q. The only assessment it hasn't paid is the special assessment of December 15, 1928?

A. Yes, sir.

2210 Q. Mr. Stephens, you are familiar with the differences in the status and functions of state and national banks?

A. Yes, sir.

2211 Q. Eliminating any consideration of the Guaranty Fund matter Guaranty Fund Law instead of matter, what advantages if any do state banks have over national banks?

Mr. Sidner: Object to that as not proper cross examination.

Mr. Campbell: If necessary we will make him our witness for this matter.

A. Speaking for myself—now there is a difference of opinion among bankers but speaking only for myself we are at a disadvantage operating under a state charter.

2212 Q. Now, reverting to the assessment that you testified to the last general assessment that you paid, I mean the last regular instead of general, that was one-twentieth of one per cent?

A. Yes, sir.

2213 Q. And what was approximately your payment on [fol. 514] that basis?

A. It would be one-twentieth of 1% of our average deposits for the six months period preceding December 31; I couldn't give you the exact amount. You can figure it out from my deposits which I have given.

2214 Q. It would be a matter of only a few hundred dollars?

A. Yes, sir.

2215 Q. That assessment, Mr. Stephens, you are not complaining about?

A. No, sir.

2216 Q. But that assessment would be a grossly inadequate assessment to meet any situation like we have here in this (interrupted).

A. It would be a grossly inadequate assessment to meet a grossly mismanaged lot of banks.

2217 Q. But of course you are not charging that the depositors have grossly mismanged the lot of banks?

A. The depositors' representatives did and I have had to pay for them.

2218 Q. Whose representatives do you refer to?

A. The depositors representatives.

2219 Q. Who are they?

A. The officials of the banking department, the governor and their legislators.

2220 Q. Do you include the Guaranty Fund Commission?

A. They are not representing the depositors, merely administer a lot of dead banks.

2221 Q. That is composed of bankers, are they in solvent banks?

A. That isn't a proper question to ask me, I don't know whether their banks are solvent or not.

[fol. 515] 2222 Q. Under the law they are required to be solvent banks?

A. Yes, sir.

2223 Q. Mr. Stephens, unless your bank and the others that are associated with it in this litigation are required to pay this assessment of December 15, 1928, and further assessments to pay off this deficit, neither your bank or the other banks will do so?

A. No, they will not.

Mr. Sidner: Object to that as immaterial and irrelevant. Move to strike out the answer until I can make the objection. Withdraw the objection and let answer stand, rather than argue.

By Mr. Sidner:

2224 Q. Mr. Stephens, you were asked if your bank was clean. Do you expect to keep it clean, do you?

Mr. Abbott: Object, he didn't answer his bank was clean.
The Court: He may answer.

Exception.

A. Yes, sir, I do, that is why we are contesting this suit.
2225 Q. Mr. Stephens, you were asked about the Guaranty Fund Commission; does the Guaranty Fund Commission have any charge or control over any bank until it has been turned over to it?
A. None whatsoever.
2226 Q. They have nothing to do then, with them, the managing of the going banks until the Department of Trade and Commerce has taken them over?
[fol. 516] A. No, sir.

Mr. Sidner: That is all.
Mr. Abbott: That is all.

Witness excused.

Mr. Abbott: Your, Honor, we have given notice to counsel for plaintiff to produce certain papers and documents, which has not been complied with. I believe the statute fixes the penalty for not doing it. (Reads:) "In the District Court of Lancaster County, Nebraska. Abie State Bank, Abie, Nebraska, plaintiff, vs. Adam McMullen, as Governor of the State of Nebraska, and Clarence G. Bliss, as Secretary of the Department of Trade and Commerce, Defendants. Notice to Produce. To Gaines, McGilton, Van Orsdel & Gaines, Courtright, Sidner, Lee and Gunderson, and Hainer, Flansburg and Lee, Attorneys for the plaintiff and for the banks listed and set out in Exhibit A attached to the petition of the plaintiff:

You are heerby notified and requested to produce at the trial of the above entitled cause in The District Court of Lancaster County, Nebraska, January 29, 1929, the following papers and documents: A copy of each form of certificate of deposit and of each form of check used by the plaintiff bank and each of said banks listed in Exhibit A [fols. 517 & 518] attached to the petition of the plaintiff, since July 1, 1911, and to designate during what years each of said forms of certificates of deposit and said forms of

checks were used by each of said banks. C. A. Sorenson, Attorney General."

Mr. Flansburg: We would be glad to comply with any reasonable request of counsel but that calls for a great mass of data that would take a long time to assemble, and I doubt if we could get all that from the different banks. There is nothing in that order that requires us to produce them, that is not a notice under the statute.

The Court: I haven't read the statute for years but of course your rights would be measured by the statute. (Here reference was had to Section 8901 of the Compiled Statutes of Nebraska for 1922.) This wouldn't be notice under the statute, it doesn't comply with the provisions of the statute.

Exception.

[fol. 519] Mr. Clarence G. Bliss, called as a witness on behalf of the defendants, having been previously sworn, testified as follows:

By Mr. Abbott:

2227 Q. Mr. Bliss, prior to becoming Secreatry of the Department of Trade and Commerce what was your occupation?

A. Banking.

2228 Q. How long were you in the banking business?

A. Since 1907.

2229 Q. And where?

A. Bank at Elm Creek, Nebraska.

2230 Q. Are you a member of the State Bankers Association?

A. I am a member.

2231 Q. Yes.

A. Yes.

2232 Q. How long have you been a member of the State Bankers Association

A. All of that time.

2233 Q. Did you ever occupy any official position with that Association?

A. Yes, sir.

2234 Q. What position and when?

A. I was elected president in 1926.

2235 Q. Did you hold that office until you took office as Secretary of the Banking Department?

A. Yes, sir.

2236 Q. Have you served in the state legislature, Mr. Bliss?

A. Yes, sir.

[fol. 520] 2237 Q. What years were you in the Legislature?

Mr. Gaines: Objected to as incompetent and immaterial.

The Court: He may answer.

Exception.

A. 1921, 1923 and 1925.

2238 Q. What branch?

A. In the Senate.

2239 Q. In the State Senate?

A. Yes.

2240 Q. During those three sessions of the State Legislature were you upon the banking committee in any session?

A. Yes, sir, I was, every time.

2241 Q. And were you chairman in any session?

A. I was chairman of banking in 1923 and 1925

2242 Q. Let's see, when did you take office as Secretary of the Department of Banking, Mr. Bliss, of the Department of Trade and Commerce?

A. In February, 1927, the first of February, 1927.

2243 Q. And in the matter of your membership in the State Bankers Association for the twenty years since 1907 have you attended its sessions?

A. Practically all of them.

2244 Q. Do you know approximately the percentage of the bankers of the state that are members of the State Association?

A. Yes.

2245 Q. About what percentage, Mr. Bliss?

A. All of the bankers with the exception of—it runs twenty to twenty-five banks that are not members.

2246 Q. That Association includes both state and national bankers?

[fol. 521] A. Yes, more some years than others.

2247 Q. The ones that are not members include both state and national banks?

A. Yes.

2248 Q. Does this Association, Mr Bliss, maintain an office, a permanent office, with a force of employees?

A. Yes, sir.

2249 Q. And has it during the last twenty years?

A. Yes, sir.

2250 Q. Did you at any time serve on the Legislative Committee of the State Bankers Association?

A. I think not, because I have been in the other end of the work.

2251 Q. You were in the Legislature of 1923 that amended the Guaranty Fund Act, were you?

A. Yes.

2252 Q. And also that of 1925 that amended the rate of interest to be paid by the state banks on certificates of deposits and interest bearing funds?

A. Yes, sir.

2253 Q. Have you, as from your familiarity with the banking situation and in your capacity as Secretary of the Department of Trade and Commerce made any compilations or figures on the effect of that reduction of interest on the earnings of the State Banks in Nebraska? That is just the question, whether you have done so?

A. Yes, I have made a certain study of it, yes.

2254 Q. Have you a printed or typewritten statement you prepared in that connection?

[fol. 522] A. Yes, sir.

2255 Q. You may refer to such memorandum as you have in this connection. When was the effective date, Mr. Bliss, if you know, of the Legislative Act reducing the interest rate on interest bearing deposits from 5% to 4%?

A. I recall the statute took effect in April, 1926.

2256 Q. April, 1926?

A. Yes, sir.

2257 Q. And state, if you know, the amount of interest bearing deposits in the state banks of Nebraska of that date?

Mr. Flansburg: We don't know from what record he is taking this data and have no way of cross examination. I

think as foundation here it should be shown from what particular records he has taken these.

The Court: What do you say to that, Mr. Abbott?

Mr. Abbott: It will probably save time to ask a few questions along that line.

2258 Q. Mr. Bliss, have you consulted the records of your office, the official records of your office and ascertained therefrom the amount of interest bearing deposits in state banks at the effective date of this law?

A. Yes.

2259 Q. And in ascertaining those deposits, from what records did you obtain them?

A. From the call reports as submitted by the banks, showing the total deposits for a certain period, part of the de- [fol. 523] posits were time and part were checking accounts.

2260 Q. And the deposits you refer to are the call reports of the banks themselves, of the amounts they had of interest bearing deposits?

A. Yes.

2261 Q. Now, you may state the amount, Mr. Bliss, of the interest bearing funds at the effective date of this law.

Mr. Flansburg: Exactly what he is testifying from is not clear yet. We don't know what call reports are.

2262 Q. Before you answer that question for the counsel's benefit I will ask you to state what call reports are.

A. By call reports we mean the call for the published statement that is sent out by the Department and when that statement is made by the banks it is tabulated and shows general deposits and resources and liabilities of that bank for that period, published in a general statement.

2263 Q. And does this report as received from the banks show separately the interest bearing deposits and non-interest bearing deposits?

A. Yes, sir.

2264 Q. Now you may state the amount and answer the question.

By Mr. Flansburg:

2265 Q. Do your records show the amount of interest the interest bearing accounts drew?

[fol. 524] Mr. Abbott: Object to that as not proper question; we will get to that later. I can't perfect the whole thing by one question. Its objected to as not applicable to the situation. We'll get to the interest matter later, this question does not contemplate the amount of interest.

The Court: It is probably not material yet, is it?

Exception.

By Mr. Flansburg:

2266 Q. This data that you have obtained is from the sworn reports made up by the banks and on file in your office?

A. Yes.

2267 Q. Sworn to by an officer of the bank and giving you such information as you require?

A. Yes, sir.

2268 Q. And those are public records you refer to and from which you will give your testimony?

A. Yes.

By Mr. Abbott:

2269 Q. You may proceed and answer the question, Mr. Bliss.

A. The amount of time money as shown by the call reports of June 30, 1926 was $167,462,943.

2270 Q. On June 30, 1926 it was how much?

A. $167,462,943.

At this time an adjournment was taken until 1:30 o'clock p. m. of the same day, February 6, 1929, when the following proceedings were had, to wit:

[fol. 525] Mr. Hotz: It is stipulated that the evidence of the Defendants in this case may be treated as also offered by the intervening depositors, thereby saving duplication, subject however to all objections made by the plaintiffs.

Mr. Clarence G. Bliss, called for further direct examination by the Defendants, testified as follows:

By Mr. Abbott:

2271 Q. Then would you have the time money as of a later date than 1926, Mr. Bliss?

A. Yes, the same date a year later.

2272 Q. That would be June 30, 1927?

A. Yes.

2273 Q. What was the amount of interest bearing deposits in the State Banks of Nebraska on that date?

Mr. Flansburg: Object to the question as no sufficient foundation laid and assuming a fact not testified to by witness that time deposits mean interest bearing deposits.

The Court: Objection sustained.

Exception.

2274 Q. Now, Mr. Bliss, when you refer to time money, what do you mean?

A. Money on which interest is paid by the banks or deposits on which interest is paid by the banks.

2275 Q. What was the amount of interest bearing deposits in the State Banks of Nebraska on that date, June 30, 1927?

A. Such deposits on June 30, 1927 were $173,203,955.06. [fol. 526] 2276 Q. Do you know in what parts of the state the banks were paying interest at 5% on their interest bearing deposits prior to the enactment of this law?

Mr. Flansburg: Object as incompetent, irrelevant and immaterial and no sufficient foundation laid.

The Court: Overruled.

Exception.

A. Yes.

2277 Q. You may state.

By Mr. Sidner:

2278 Q. Is this information that you claim to have from the reports in your office?

A. Yes.

2279 Q. Have you personally looked over the reports of June, 1926?

A. To quite an extent, yes, sir.

2280 Q. Do those reports themselves show what rate of interest is paid on the different obligations?

A. Yes.

2281 Q. As a matter of fact, Mr. Bliss, do not those reports show only this, "What is the maximum rate paid on

time deposits?" and the bank answers on that report?

A. The reports all show the highest rate paid and the lowest rate paid and the maximum rate paid.

2282 Q. Do you have a copy of that report with you?

A. No, I do not.

2283 Q. Don't those reports that you examine to get this information show only the maximum rate paid and not the minimum?

[fol. 527] A. The maximum would be the highest rate paid, the maximum.

2284 Q. That's what the word maximum means, I guess.

A. Yes, they show that.

2285 Q. But they do not show any other fact, other than the maximum rate paid, isn't that a fact?

A. Yes, that is a fact.

2286 Q. And that is the only thing you have to go on, upon which you are basing your information, those reports which simply show the maximum rate paid?

A. From the standpoint of reports.

2287 Q. What else do you know?

A. I know from bankers' meetings.

2288 Q. Oh, hearsay, is it?

A. Bankers' meetings where they voted whether to go to a three percent basis or four or five percent basis.

2289 Q. What meetings?

A. Group meetings and state meetings.

2290 Q. Do you have a copy of any of those reports which you looked at, with you?

A. I don't have them in my file here.

2291 Q. Doesn't the book you have in your hand show those reports?

A. Only so far as the interest bearing deposits, not the rates.

2292 Q. The rates are not given on that report, then?

A. No.

2293 Q. What other report is there that shows the rate?

A. The actual call reports submitted to the Department [fol. 528] quarterly by the banks.

2294 Q. They simply show, as you suggested, the maximum rate?

A. Yes.

2295 Q. Nothing to indicate the minimum or any other rate?

A. No, there is nothing.

Mr. Flansburg: I don't know as it is material to show what the effect of a law passed in 1925 reducing the maximum rate of interest on time deposits was on the earnings of these banks. It is an issue entirely apart and has no relation to the question of the Guaranty Fund nor can it be an issue in this case. It may be they intend to spend considerable time proving all this, but in the end it is confusing to the interests here; it isn't a part of the Guaranty Fund Law and although pleaded in the petition we had just let it stand to save time but the enactment of that law or as to what these banks, whether they only charge 4% or 2% or 3% is not material. And when we do get into that, as to how much these banks paid on time deposits or as to what effect this law of 1925 fixing the maximum rate of interest had on their earnings, after we get all that in here it wouldn't throw any light on the Guaranty Fund Law and its provisions and whether the Guaranty Fund Assessments are excessive. The rate of interest is all a matter of competition, as to how much the bank can [fol. 529] charge and as to this law, entirely apart from the Guaranty Fund Law your Honor should prevent going into that issue as not having any bearing on the issues in this case. After they show the conditions of those banks, regardless of what the reason is the question still is what is their ability to pay, what is the operation of this law; they can go into all the issues with respect to those losses and get into any number of side issues and we object to the introduction of any further testimony on this line for the reason it is incompetent, irrelevant and immaterial.

The Court: There is nothing before us now, just a question of asking something else.

By Mr. Abbott:

2296 Q. Br. Bliss, referring to the act of the Legislature of 1925 amending the banking law, reducing the rate of interest on time deposits from 5% to 4%, do you know when that act was first introduced in the Legislature?

Mr. Flansburg: Objected to as incompetent, irrelevant and immaterial, and having no bearing on the issues in this case.

The Court: We will consider Mr. Flansburg's argument as made to this objection. I am glad to have had this discussion, because it will save time later on. I will let the testimony in and I might say it seems to me, however, that if the question of the reasonableness of this law as contended [fol. 530] by the plaintiffs was a material question in this case, then all these elements have got to be considered. Objection overruled.

Exception.

A. I know when a similar act was introduced.

2297 Q. Making a reduction?

A. Yes.

2298 Q. When was it?

A. In 1921.

2299 Q. You were in that Legislature?

A. Yes, sir.

2300 Q. And was that argued before your committee?

A. Yes, sir.

2301 Q. Did it fail to pass at that session?

A. Yes, sir.

2302 Q. Now, when was it next introduced?

A. It was introduced again in 1923 and brought before the Committee on banking of which I was chairman.

2303 Q. And it failed to pass at that session?

A. Yes, sir.

2304 Q. And was it passed as now exists in 1925?

A. Yes, sir.

2305 Q. Now, then, Mr. Bliss, in connection with those several acts before the Legislatures of 1921, 1923 and 1925 and especially in 1925, the time of passage, were there hearings upon the act before the committee on banking?

A. Yes, sir.

2306 Q. And how extensive were those hearings, especially in 1925?

A. They were, in all of the sessions it was a very much [fol. 531] debated question, and particularly in 1925.

2307 Q. Now, in 1925 was there a Legislature Committee of the State Bankers Association?

A. Yes, sir.

2308 Q. And did that committee appear before your committee in furtherance of the enactment of the law of 1925?

Mr. Sidner: Object as assuming a fact not proved and calling for the conclusion of the witness.

Mr. Abbott: Withdraw the question.

2309 Q. In 1925 did representatives of the bankers of the state appear before your committee in favor of that act?

Mr. Sidner: Object as incompetent, irrelevant and immaterial, calling for the conclusion of the witness and no foundation laid.

The Court: Overruled.

Exception.

A. There were many bankers came to the Legislature to favor that legislation, appeared before the committee. I don't particularly recall the Association took a very active hand in it but bankers generally came there——

Mr. Sidner: Move to strike out the word "generally" as conclusion of the witness.

The Court: Sustained.

Exception.

2310 Q. What bankers, Mr. Bliss, appeared before the Legislature of 1925 urging the enactment of this law?

Mr. Sidner: Object to that question for the reason it includes in there "urging this law." Let's find out who was there and then what was said. Object also as call-[fol. 532] ing for conclusion of the witness.

The Court: Overruled.

Exception.

A. I would say such bankers as Mr. Dan Riley, Mr. McLucas. They were there as I recall it; there were probably, during the session, a hundred bankers or more during that time, besides a number who wrote letters to their different senators and representatives. They must have put on some effort or the senators and representatives would not have agreed to it.

Mr. Sidner: Move to strike out the latter part of the answer, from "They must have" as conclusion of the witness.

The Court: Sustained.

Exception.

2311 Q. Mr. Bliss, in these sessions did anyone other than bankers appear in favor of it?

A. I don't recall of any.

2312 Q. Now, in these committee sessions you may state what if anything, was the principal reason urged for the passage of this amendatory act reducing the rate of interest?

Mr. Sidner: Objected to as incompetent, irrelevant and immaterial, calling for the conclusion of the witness. If it is a question of estopel you have a right to have the person who said it called.

The Court: I think you might leave out the word "principal" in the question.

Mr. Abbott: Withdraw the question and will put it in another form.

[fol. 533] 2313 Q. In these sessions of your committee, what reason if any was advanced by these bankers in favor of the bill, that had reference to the Guaranty Fund Law, the Guaranty Fund feature of the law?

Mr. Sidner: Objected to as incompetent, irrelevant and immaterial, calling for the conclusion of the witness and not a statement of fact.

The Court: He may answer.

Exception.

A. One of the reasons discussed in the committee was that the 4%—if they went to a basis of 4% national banks would also be on the same basis, 4%, and in view of state banks paying an assessment to the Guaranty Fund it made the same money cost the state banks .6% more than it did the national banks.

Mr. Sidner: I move to strike out the answer as not responsive, not purporting to say what anybody said but what was discussed in the committee.

The Court: Objection sustained.

Exception.

A. Well, the bankers felt and agitated to the committee that by paying 4% for money plus the 1%, that was in 1923 and .6% it was after that, that it would make their time

money cost them this amount of the assessment to the Guaranty Fund in addition to the 4% rate which would be paid by the national banks.

2314 Q. And what request, if any, did these bankers make to you with respect to reducing the rate from 5% to 4%?

Mr. Sidner: Objected to as incompetent, irrelevant, im-[fol. 534] material, calling for the conclusion of the witness and further, no foundation laid.

The Court: He may answer.

Exception.

A. They all requested it, generally.

2315 Q. Requested what?

A. The reduction.

2316 Q. Now, did your committee, after these hearings, make a report to the Senate on this bill?

A. Yes, sir.

2317 Q. Favorable or unfavorable?

A. Favorable.

2318 Q. Was your committee induced to make its favorable report by these representations made by the bankers at that time?

Mr. Sidner: objected to as incompetent, irrelevant and immaterial, this witness not being able to state, to speak for a committee of several members and the record of their report being the best evidence.

The Court: Objection sustained.

Exception.

Mr. Abbott: May I ask on what grounds, your Honor?

The Court: He couldn't speak as to what influenced the whole committee, only for himself. When you give the reasons urged you have pretty nearly presented the matters you wish to present.

2319 Q. Now, Mr. Bliss, in connection with the hearings [fol. 535] that were had before your committee in 1923, 1923 and 1925 how many bankers would you say, different bankers, appeared before your committee in those several sessions?

Mr. Sidner: Objected to as incompetent, irrelevant and immaterial as to 1921 and 1925.

The Court: Overruled.

Exception.

A. I would say that different sections of the state were well represented at sometime during each session. I would not be able to state the number of bankers but the state as a whole was well represented at different times during the sessions.

2320 Q. Now, in your contact with these bankers from over the state, Mr. Bliss, your committee's contact, did you gain some information as to what interest rate was being paid in various localities?

A. Yes, sir.

2321 Q. Now, from your experience in the Legislature, your experience as Secretary of the Department of Trade and Commerce and your experience as a banker and in connection with the State Bankers Association and its activities and your other information, are you able to state what portions of the state, or rather what portion of the banks therein were paying interest at the rate of 3% on interest bearing deposits prior to the enactment of this law and its effective date? You may answer that "Yes" or "No," whether from all your experience you are able to state.

[fol. 5261] A. Yes, generally.

2322 Q. You may go on and state.

Mr. Sidner: Objected to as incompetent, irrelevant and immaterial, no sufficient foundation laid, witness having already disclosed it is from bankers and this is not expert testimony.

The Court: I might suggest this evidence could best be taken from the records of the Department, showing the interest paid. There might be some information of this character admitted, but I am not sure the rule would apply here. You have at your command some very definite information and it seems to me that is more competent than this general information. It looks to me as if this evidence is hearsay and I recognize a certain class of hearsay evidence may be received, but I am not satisfied that this reached that stage and at the present time it looks as if this is just

hearsay testimony. He would have a right to give a summary of these records of his Department, as to what they showed.

Exception.

2323 Q. Mr. Bliss, did you have occasion at that time, in your capacity as member of this banking committee and later in your capacity as Secretary of the Department of Trade and Commerce, and did you inform yourself as to those locations in the state in which the rate of interest, [fol. 537] immediately prior to the enactment of this law, was 5%?

A. Yes, sir.

2324 Q. Now, Mr. Bliss, in connection with these public hearings and agitation did it become a matter of general public knowledge in the banking circles as to what localities were generally paying interest at the rate of 5% on interest bearing deposits, up until the time of the enactment of this law?

A. Yes, sir; yes, sir.

2325 Q. Now, from the information that you obtained from the records in your Department, and otherwise, are you able to state the localities in which the banks were paying interest at 5%, immediately prior to the passage of this Act in 1925 and its effective date?

A. Yes, I can.

2326 Q. Now, you may state.

Mr. Sidner: Objected to as incompetent, irrelevant and immaterial and no sufficient foundation laid, the examination showing it was based on hearsay evidence.

The Court: I am inclined to think it is. I have no hesitation is letting him give the records as he has summarized them. There is one element of doubt in my mind, whether it is enough of a public character that it might be received on that ground. Objection sustained.

Exception.

[fol. 538] The Court: I might say now, as we are having an interruption: the question being held in abeyance a day or two ago with reference to the admission of the Governor's message, that the authorities seem to indicate a mes-

sage of that character the Court, of his own—should take judicial knowledge of and that being true it would not be necessary and perhaps not proper to introduce them but they might be received without introducing them just as you receive a decision of the court in presenting an argument.

Mr. Gaines: For the purpose of the record we would like to have that ruling made. Our theory is it is admissible as being information that has been published just as much as these newspaper advertisements gave it at an earlier date; they claim the speech was an article giving common information and we want the record to show it was not excluded but that the Court would consider it. We would like to have a ruling on both these paragraphs of the Governor's message.

The Court: Objection overruled. (To the reporter:) When the introduction is found, show that the objection is overruled and that the two paragraphs are admitted in evidence.

The two paragraphs referred to above, contained in Exhibit 11, received in evidence, are attached to and made a part of this bill of exceptions, appearing at page 197 hereof.

[fol. 539] Mr. Abbott: The Defendants desire to ask further foundation questions along this line (interest reduction and payment on deposits) and take the Court's ruling thereon before making an offer of proof and with the Court's permission will defer that for the time being and take up another subject and in the meantime will see about getting some law on that.

The Court: That is agreeable to the Court!

[fol. 540] 2327 Q. Mr. Bliss, calling your attention to Exhibit #10, heretofore numbered, you may state whether or not that is a record of your Department, prepared in your Department?

A. Yes, it is.

2328 Q. And one of the official records of your Department, a compilation?

A. Yes, sir.

2329 Q. It purports to be a Report of the Last Call Reports for the years 1911 to 1928, inclusive. You may state

about when that was prepared?

A. During the month of January of this year.

2330 Q. And attached are the statistics relating to the Depositors Guaranty Fund. Was that also prepared in your Department?

A. Yes, sir.

2331 Q. And at the same time?

A. Yes, sir.

2332 Q. Was this prepared under your supervision in your office?

A. Yes, sir.

2333 Q. And is it a correct abstract of the records of your office?

A. Yes, sir.

Mr. Abbott: Exhibit No. 10 is offered in evidence.

2334 Q. On what reports, Mr. Bliss, did you compile that statement? You may look at it (handing witness Exhibit No. 10).

[fol. 541] A. On what reports?

2335 Q. Yes, sir.

A. Well, from the last call reports of the banks made from year to year as shown in the records of the office.

2336 Q. On the Exhibit itself it indicates what parts were prepared from the call reports, does it not?

A. Yes.

2337 Q. And referring to the words "Figures below were compiled from Special Report of 618 Banks", from what reports were those prepared?

A. Under the statute the Department may require banks to make special reports. The request for this special report was sent out to all banks and those were the banks that reported and that compilation was made up of the banks reporting.

2338 Q. A few days ago in this case, testifying in behalf of the plaintiffs, you gave the capital stock, the aggregate capital stock of the banks in a certain period and the aggregate deposits and real estate at certain periods. Were those figures taken by you from this particular report?

A. Yes, sir.

Mr. Abbott: We offer in evidence Exhibit No. 10.

Exhibit No. 10 received in evidence, is made a part of this Bill of Exceptions, and is attached at page 581 hereof.

[fol. 542] 2339 Q. Mr. Bliss, when was the first assessment levied under the Guaranty Fund Law of 1909?

Mr. Flansburg: Object as repetition. The exhibit shows all that.—Withdraw the objection.

A. In 1911.

2340 Q. Now, I challenge your attention to the fact as disclosed by Exhibit No. 10 that the deposits in the state banks of Nebraska increased from approximately seventy-four million on December 5, 1911 to two hundred fifty-two million on December 31, 1928. Approximately three and one half times. Now, have you made some comparisons as between that increase of deposits and the increase of deposits in Iowa during a similar period?

A. Yes.

2341 Q. And what was your source of information as to the Iowa deposits during the same period?

A. The Iowa report, the official report of the Banking Department of Iowa.

2342 Q. You have that report, do you?

A. Yes.

2343 Q. You may state in what ratio the deposits in the Iowa state banks increased during the same period.

Mr. Flansburg: Objected to as incompetent, irrelevant, and immaterial, no sufficient foundation laid.

The Court: I don't see how you are going to show any foundation for that. Objection sustained.

Exception.

Mr. Abbott: Defendants and Intervenor Stebbins offer [fol. 543] to prove by the witness on the stand that during the period from the year 1911 to the year 1928 inclusive that the deposits in state banks of Iowa increased in the ratio of two to one, doubled and no more.

Mr. Flansburg: Object to the offer for the same reason we objected to the question.

The Court: Objection sustained.

Exception.

2344 Q. Mr. Bliss, have you made an investigation and ascertained how many national banks converted to state banks in the State of Nebraska from or after the year 1911?

A. Yes, sir.

2345 Q. And from what source did you get your information?

A. From the report of the Comptroller of the Currency.

2346 Q. That is, converted from national to state banks?

A. We have that at our office, yes.

2347 Q. You have that in your office?

A. Yes.

2348 Q. And you may give me, if you know, the number of national banks converting to state banks in the year 1911 down to the present.

Mr. Flansburg: Objected to as incompetent and immaterial.

The Court: Overruled.

Exception.

A. Fifty banks.

2349 Q. Give them by years.

[illegible]

2350 Q. Now, during the years [illegible] how many converted from state banks to national banks?

A. The first conversion from [illegible] bank [illegible] bank. In 1923 [illegible] banks [illegible] banks.

2351 Q. How many in that period?

A. In that [illegible] period [illegible]

2352 Q. Now, during the years [illegible] 1910 and 1911, when it was held by the Supreme Court of the United States, there were some state banks that converted into national banks back in that period?

A. Yes, sir.

2353 Q. But after the decision rendered in 1911 and the final adjudication [illegible] there was no [illegible]

A. Yes, sir.

2354 Q. Now, during the period from 1911 down to the year 1923 inclusive, have you made some computations as to the extent of the increase of deposits in national banks?

A. Yes, sir.

2355 Q. And what was the increase of deposits in national banks during that period, in Nebraska? What was the source of your information?

A. The reports of the Comptroller of the Currency.

2356 Q. And what was the increase in national banks dur- [5451]
ing the period referred to in Nebraska.

A. The increase was from $83,360,000 to $193,621,000 at the close of 1921.

2357 Q. And in 1928?

A. 1928 has not been completed by the Comptroller's Report.

2358 Q. From the Comptroller's Report have you ascertained the number of national banks in Nebraska, in 1909?

A. Yes.

2359 Q. How many national banks in Nebraska in 1909?

A. 319.

2360 Q. How many in 1928?

A. 158 reporting in 1928.

2361 Q. I notice on Exhibit 10 that for the periods ending December 31, 1926 and December 31, 1927 and 1928 that there seems to have been a reduction in the aggregate of the deposits. Was there any segregation of deposits that influenced that reduction?

A. Yes.

2362 Q. What was that segregation?

A. The removal of banks insured by the Guaranty Fund Commission as going concerns.

2363 Q. In other words, the deposits in banks being operated by the Commission as going banks had, prior to that time, been included in the total and after that time were separated and acted below, on Exhibit 10, is that correct?

A. Yes.

2364 Q. Does the aggregate of the deposits in all banks for 1927 would have continued on up for those three or four years, would they, if the deposits you had segregated had been included in the total?

Mr. Flansburg: Objected to as complicated, calling for conclusion of the witness and not a statement of any fact.

Mr. Abbott: Withdraw the question.

2365 Q. The deposits in banks in the hands of the Commission are listed in that same column, "Total Deposits" down at the bottom of the page?

A. Yes.

2366 Q. And those are not included in the totals above?

A. No, sir.

2367 Q. Mr. Bliss, what is the name of Mr. Seelentreund's bank?

A. The Continental State Bank.

2368 Q. Do you have present with you in Court a statement of that bank made to your Department for the years 1920 and 1928?

A. Yes, I believe I do, it is a publish'd statement.

2369 Q. You may refer to the published statement and give the total deposits of the Continental State Bank of Lincoln at the close of business on November 13, 1920?

A. $1,313,908.35.

2370 Q. You may refer to the reports of your Department and give the total deposits of the Continental State Bank at the close of business, June 30, 1928.

A. $4,056,056.60.

2371 Q. And also at the close of business December 31, 1928?

[106,547] A. $3,805,639.72.

2372 Q. And that bank, during that eight year period, has increased its deposits about two and one half times?

A. Yes, the figures show it.

Mr. Flansburg: Object as to the method of computation.

The Court: Sustained.

Exception.

2373 Q. Do you know whether or not there has been any consolidation of the bank with other banks, during that period?

A. I don't know, during that time.

2374 Q. Mr. Bliss, handing you Exhibit No. 22 I will ask you to state if that is one of the records of your office, the Department of Trade and Commerce?

A. Yes.

2375 Q. And is that, or you may state what it is?

A. It is a compilation of the last call report of 1928 of 726 banks reporting.

2376 Q. And is that a correct statement of all those banks as of December 31, 1928?

A. Yes, sir.

Mr. Abbott: I offer in evidence Exhibit No. 22. If it is agreeable to the court I will defer taking up the examination until morning. Exhibit No. 22 received in evidence, attached hereto and made a part of this bill of exceptions and found on page 582 hereof.

Whereupon an adjournment was taken to the following day, Thursday, February 7, 1929, at nine thirty A. M.

[fol. 548] Thursday, February 7, 1929, nine thirty A. M., court convened and trial resumed pursuant to adjournment.

Mr. Clarence G. Bliss, a witness heretofore called on behalf of the defendants, resumed the stand and testified as follows:

By Mr. Abbott: The Defendants and Intervening Defendant Stebbins offer in evidence Exhibit 24-1 to 24-100, being forms of checks, certificates of deposit and deposit slips of various banks, state banks in Nebraska and of the banks respectively named on the separate items of said Exhibit and which, by agreement of counsel, were the checks, certificates and deposit slips in use for many years last past by the respective banks named thereon and furnished to their customers for their use and used by them in their business relations with the respective banks.

Mr. Gaines: Objected to as immaterial.

The Court: Overruled.

Exception.

Exhibit 24-1 to 24-100 are received in evidence, attached hereto and made a part of this bill of exceptions and found on page 583 hereof.

2377 Q. Mr. Bliss, in what manner are and have been the banks notified of the levy of the general and special assessments in the past?

A. The regular assessments, they have been notified on the blanks furnished to them to make the report of their [fol. 549] average deposits for the six months period and upon the return of that blank the Department computes the

amount of the regular assessment and instructs them to credit it to their account.

2378 Q. Then the first step is the procuring from the bank each year of the statement on departmental form of its average daily deposits?

A. Yes, sir.

2379 Q. And that is the basis upon which the special assessment is levied?

A. Yes, sir, that is provided by statute.

2380 Q. How long have you been familiar with the departmental forms notifying the banks of the special assessment and the amount thereof?

A. Ever since the law was made.

2381 Q. Having operated a state bank and receiving them during that time?

A. Yes.

2382 Q. Have you made an examination in your Department so as to ascertain the form that was sent out?

A. Yes.

2383 Q. Handing you Defendants and Intervenor Stebbins' Exhibit 25 and 26 I will ask you to state if you know what those are?

A. Yes, sir.

2384 Q. What are they?

A. Exhibit No. 25 is an original letter printed and addressed generally to the banks of which the particular bank is not filled in and addressed but it is a letter [fol. 550] that went out to all state banks at that time, making a special assessment for that date, December 15, 1928.

2385 Q. And Exhibit No. 26?

A. Is a similar special assessment letter that was sent out to all state banks under date of March 29, 1928, making another special assessment.

2386 Q. The two forms being identical except as to some data with respect to the status of the fund?

A. Yes.

2387 Q. Now, from your examination of the records of your Department and your information as a state banker, can you state whether or not that is the form of letter that has been addressed to the state banks of Nebraska covering special assessments during the period that special assessments have been levied?

A. Yes, sir.

2288 Q. State.

A. Yes, sir.

Mr. Abbott: Offer in evidence Exhibits 25 and 26.

Mr. Sidner: No objection to Exhibit No. 25. Object to No. 26 because it is immaterial.

Mr. Abbott: I won't insist on the offer; if the counsel objects I will withdraw the offer of Exhibit 26.

Mr. Sidner: Withdraw objection to No. 26.

Exhibits Nos. 25 and 26, received in evidence, No. 25 [fol. 551] and 26 read to the Court by Mr. Abbott, attached to and made a part of this Bill of Exceptions, appearing at page 584-585 hereof.

2289 Q. Mr. Bliss, is this the notice that went out for the assessment that is in controversy in this case?

A. Yes, sir.

2290 Q. And you state the other notices that preceded it were identical except as they might contain some data as to the fund?

A. Yes, sir.

2291 Q. Now, these assessment notices, I take it, were duly mailed to all the state banks in the state about the date of the assessment?

A. Specifically addressed to each one.

2292 Q. As mailed, they had the blanks filled in as to the average daily deposits and the assessment of the particular banks?

A. Yes.

2293 Q. Mr. Bliss, I note that this notice of the special assessment states that the special assessment of one fourth of one per cent had been levied against all the state banks in Nebraska. Now, do your records disclose any where to your knowledge any protest or objection, since your Department has been mailing out these notices, raising the question that the particular assessment was not an assessment against the bank but an assessment against the stockholders or otherwise than against the bank?

[fol. 552] A. No, sir, nothing of record.

2294 Q. Have you, in your contract with the Department, as head of it, ever heard the question raised by any

to what funds do these particular banks pass the dividend thus mailed to them?

A. To the Guaranty Fund account carried in their bank.

2412 Q. Referring to these amounts thus credited from the sale of assets and credited to the Guaranty Fund account in the particular bank what disposition or use does the particular bank thus receiving credit make of that money?

A. That money remains on hand in their bank plus the assessment that they pay in and generally, at a later date, the Department draws a draft for the full amount and draws it out again.

2413 Q. For the payment of losses?

A. Yes.

2414 Q. In making these distributions back out of the assets of such failed banks, to whom do you make that distribution?

A. To the solvent banks.

2415 Q. To the solvent banks. Has any bank ever, to your knowledge, raised the question that as to these refunds or these credits back, as to these funds thus remitted for credit, that any stockholder had an interest therein because the special assessments were against capital stock?

Mr. Sidner: Objected to as assuming a fact not proved, involved and calling for the conclusion of the witness.

The Court: Objection sustained.

Exception.

[fol. 556] Mr. Abbott: I would like to withdraw the question if it is subject to the wrong inference.

2416 Q. Mr. Bliss, do you recall the aggregate amount of these special assessments in controversy here?

A. Just in round figures.

2417 Q. What is the amount a year?

A. $622,000 in round figures.

2418 Q. Then the average daily deposits as shown by the returns of these banks on file in your Department four hundred times that amount, that is *that is* one-fourth of one per cent?

A. Yes, sir.

2419 Q. I understand you do not have the amount, exactly, of the deposits, here, do you?

A. The report of deposits from the banks subject to this assessment will vary from the published statements.

2420 Q. But, anyway, the amount of the deposits would be the amount thus computed?

A. Yes, on that basis that is subject to this assessment.

2421 Q. Mr. Bliss, referring to the matter of the reduction in number of state banks, was any of that reduction occasioned by a consolidation with other banks?

A. Yes, sir.

2422 Q. You may give us the number of banks that consolidated with other banks while in a going condition.

A. The records of the office disclose consolidations made of state banks with other banks: in the year 1918 of 8, 1919, 2; 1920, 7; 1921, 4; 1922, 10; 1923, 6; 1924, 5; 1925, 9; [fol. 557] 1926, 5; 1927, 3; and 1928, 12 or a total of 71 consolidations during that period.

2423 Q. Mr. Bliss, as Secretary of the Department of Trade and Commerce and as a banker have you observed the publicity of the state banks *on* Nebraska featuring the Guaranty Fund provisions of the law?

A. Yes, sir.

2424 Q. You may state your observations in that respect and knowledge, being as specific and definite as you can.

Mr. Sidner: Objected to as incompetent, irrelevant and immaterial, calling for conclusion of the witness, for the effect of advertising, it has already been proved.

The Court: He may answer.

Exception.

A. All of the state banks of Nebraska, with but very, very few exceptions, have advertised in some form or other, the benefits and advantages of the Guaranty Law.

Mr. Sidner: Move to strike out the last part of the answer as conclusion of the witness and not responsive to the question.

The Court: Overruled.

Exception.

2425 Q. You say very few exceptions. About how many exceptions, Mr. Bliss?

A. I can't recall any as I know of, only one or two.

2426 Q. Only one or two. Referring to the Exhibit No. 24-1 to 24-100, inclusive, you may glance through those just hastily, Mr. Bliss. (Witness does so.) To what extent to your knowledge, have the state banks of Nebraska used [fol. 558] either deposit slips, certificates of deposit or checks, one or all, with the words or insignia on, "Deposits in this bank protected by the Guaranty Fund of the State of Nebraska"?

Mr. Sidner: Objected to as no sufficient foundation laid.

The Court: He may answer.

Exception.

A. Very generally.

2427 Q. Do you know of any bank that hasn't used one or all, used the words or insignia on one or all of those particular items?

A. I can recall one or two that haven't done it. It has been almost impossible to buy stationery without it on.

2428 Q. Would you be able, Mr. Bliss, from referring to the banks whose slips are contained in Exhibit 24-1 to 24-100 inclusive, to state which of those banks are now in the hands of a receiver or in the hands of the Guaranty Fund Commission?

A. I believe I could.

2429 Q. You may run through the Exhibit, Mr. Bliss and call by name the particular banks and state at the same time its status in regard to the facts mentioned.

Mr. Sidner: Objected to as immaterial.

The Court: Objection sustained.

Exception.

2430 Q. Referring to this matter of publicity of the Guaranty Fund feature you may state, so far as your knowledge goes, the methods of imparting that publicity used by the banks being as definite and specific as you can.

[fol. 559] Mr. Gaines: Objected to that as calling for opinion and not giving specific statements.

The Court: He may answer.

Exception.

A. The banks generally have carried signs, advertising signs.

2431 Q. What character of signs, Mr. Bliss?

A. Plates, plated signs on their doors or on their windows and even on the sign boards along the highway; there has been quite a general advertising campaign throughout the state.

2432 Q. For how long a period?

A. Since the passage of the law down to the present time, down to the last year, particularly.

2433 Q. Do you have the newspapers coming to your Department from various parts of the state?

A. Yes.

2434 Q. And what is the fact as to whether or not the newspapers carried this advertising?

Mr. Sidner: Objected to as not the best evidence.

The Court: He may answer.

Exception.

A. It has been carried generally by the newspapers also, the same line of advertising.

2435 Q. You heard read in evidence here the advertising published in the Omaha Bee and the circulars that have been identified here, and specially the one containing questions and answers, questionnaire; were you familiar with the fact of their publication and circularization at the time [fol. 560] they were got out?

A. Yes, sir.

2436 Q. What about the matter of calendars, do you know whether or not calendar advertising has been used to some extent, as advertising?

A. Yes, very generally.

2437 Q. Containing reference to the Guaranty Fund?

A. Yes.

2438 Q. Now, what other specific character of advertising do you recall, Mr. Bliss?

A. The state banks have advertised the guaranty feature in the picture shows, shows in their little towns and in the larger towns, too.

2439 Q. Now, what form generally did this particular advertising feature take, with respect to the Guaranty Fund?

A. Yes, sir.

2441 Q. And referring to [illegible] the period you have referred to?

A. Yes, sir.

2442 Q. Now, during the period you have referred to, has there been any other form of publicity given to the Guaranty Fund and its protective features to the public, any general term? For the purpose of refreshing your memory, have there been any speeches made?

A. Yes, there has been a good many discussions and speeches made at bankers meetings and public meetings, yes.

2443 Q. Have there been any of those bankers, Mr. Bliss, who addressed public and other meetings of citizens, advertising and advocating the protective features of the Guaranty Fund Law during this period.

Mr. Gaines: Objected to as incompetent.

The Court: He may answer.

Exception.

A. Yes.

2448 Q. Now, will you state in general way to what ex-

A. We [illegible] with the idea of inform-

[illegible] banks were under the Guaranty [illegible] banks did not have

2449 Q. [illegible] to the extent of that publicity,

A. [illegible] been so thoroughly ad-[illegible] newspapers and signs [illegible] has been the minor

2450 Q. [illegible] given received [illegible] newspapers?

A. Yes.

2451 Q. [illegible] judgment, has been the [illegible] and the publicity that it has [illegible] indicated, upon the de-[illegible] to deposit

A. [illegible] favorable to state [illegible] more particularly in the country towns, [illegible]

2452 Q. And [illegible] the fact as to the condition you find [illegible] with respect to the size of the indi-[illegible] deposits of persons other than those engaged in trade [illegible]

A. [illegible] country bank.

Mr. Spence: I would like to object to this as incompetent, [illegible] and immaterial, calling for conclusions of the [illegible] witness. We don't know just where this is going to end.

The Court: He may answer.

Exception.

A. There are many country banks whose depositors have accounts, in many instances equal to the capital or larger than the capital of the bank.

2449 Q. And what, in your judgment, occasioned the placing of such deposits in state banks rather than in other investments?

Mr. Sidner: Object as incompetent, irrelevant and immaterial and calling for what was in the mind of the particular depositor that this witness, can't, even though he is an expert on those things, determine.

Mr. Abbott: Withdraw the question.

2450 Q. And what has been the practice, as you have observed it, Mr. Bliss, as to the deposits of individuals in the country banks other than the individuals engaged in trade and commerce, I mean those not engaged in trade and commerce?

Mr. Sidner: Objected to as having already been answered.

The Court: Yes, it was, but I will let him answer.

Mr. Abbott: Withdraw the question, I don't care to encumber the record.

2451 Q. To what extent, Mr. Bliss, in your judgment have the deposits of state banks in Nebraska under the operation of this law since 1911 been influenced thereby and by the publicity that has been given the law and its protective [fol. 564] features?

A. It has been influenced to a considerable extent. I have never undertaken to work up any figures on it. I have been in bankers meetings and heard it discussed. It is admitted that around our border lines we have benefited by out state deposits. Colorado bankers undertook to say——

Mr. Sidner: Object to what Colorado bankers undertook to say, move to strike out that portion of answer.

A. Around our border line considerable money came in because of our Guaranty Fund features. We have letters in our files——

2452 Q. I don't care to go into that, I am speaking of deposits made by Nebraska people.

A. The same applies to Nebraska.

2453 Q. Would you care to approximate any amount that you think the deposits have been influenced?

Mr. Sidner: Object as witness has already stated he made no figures on it.

The Court: Sustained.

Exception.

2454 Q. Could you estimate it in percentages, Mr. Bliss, give your idea?

Mr. Sidner: Object as if no figures made there could be no percentage fixed.

The Court: Sustained.

Exception.

2455 Q. Mr. Bliss, you may avert to your knowledge of the matter and see if you have any estimate along that line and I will call you later. Now, Mr. Bliss, there has been some [fol. 565] failures in Nebraska banks that have been testified to. Now, what effect, if any, has the existence of the Guaranty Fund Law had upon the going banks in the particular town or location where these failures have occurred from time to time, that is with respect to the deposits of going banks?

A. It has been common knowledge that whenever a bank fails that the going bank has not suffered; right across the street from the bank that failed the going bank has gone right along.

2456 Q. Is there any general reason for that aside from, perhaps, the strength of the going bank? Has the Guaranty Fund had any application in that respect?

A. It certainly has.

2457 Q. What has been that effect, Mr. Bliss?

A. It has given those depositors and customers in the town where the bank failed, it has given them confidence in the banking situation that they would be taken care of and has been relied upon.

2458 Q. And what would you say, Mr. Bliss, as to the conditions that prevailed from 1911 down until immediately prior to the filing of this suit, as to the element of confidence in banks generally, incident to this Guaranty Fund Law?

A. It has been very general during that period.

2459 Q. In other words, the Guaranty Fund Law has instilled general confidence in the people as to the status of their banks?

A. Yes.

Mr. Abbott: I have two or three other lines of questions [fol. 566] that we want to try to ask Mr. Bliss but I want to identify and put in evidence some exhibits first that I

will have to identify by another witness and I would like, with the Court's permission, to check up during the recess as to any other matters I can ask him about and then put on the other witness.

The Court: Very well, we will take a short recess.

Mr. VAN E. PETERSON, called as a witness on behalf of the defendants and intervening defendant Stebbins, having previously been sworn, testified as follows:

By Mr. Abbott:

2460 Q. Mr. Peterson, have you prepared a memorandum from the records of your office of the obligations of the Guaranty Fund upon which this assessment, if collected, will apply?

A. Yes, sir.

2461 Q. And does that statement show the debts upon which it will apply in the order of their priority, as your office records disclose?

A. It does.

2462 Q. Handing you Exhibit 4, produced by you, is that the memorandum to which you refer?

A. It is.

2463 Q. Is that a correct memorandum of the records of [fol. 567] your office as to the particular matters to which it refers?

A. It is.

2464 Q. I note that the first *cal*ssification is receivers' certificates and the aggregate certificates $15,496.21.

Mr. Abbott: Withdraw question and offer in evidence Exhibit No. 34.

Mr. Sidner: No objection.

Exhibit No. 34 received in evidence, is attached to and made a part of this Bill of Exceptions, appearing at page 588 hereof.

2465 Q. Mr. Peterson, referring to Exhibit 34 and the column headed "Total" is that an aggregate column, that each succeeding total includes the previous total?

A. Yes, sir.

2466 Q. I see. I note that the receivers' certificates total $15,496.21.

A. Yes, sir.

2467 Q. That is the first amount to be paid, is it?

A. Yes, sir.

2468 Q. Then comes the banks in the order of their priority?

A. Yes, sir.

2469 Q. Now as to the amounts listed after the respective banks due against the Depositors' Guaranty Fund, have those respective claims been adjudicated as claims and ordered paid from the funds?

A. They have been.

2470 Q. And noting the last column headed "Number of Claims". To what do the figures in that column refer?

A. That refers to the number of claimants in each of [fol. 568] the individual trusts on the line where the number of claimants appear.

2471 Q. For instance, "Royal State Bank, 112," would indicate there was 112 depositors with claims?

A. Yes, sir.

Mr. Abbott: I think I will read this, to be brief. (Reads Exhibit 34 to Court.)

2472 Q. Now the number of claims of the Citizens State Bank of Potter is stated to be one. Were there other claims to be paid:

Mr. Flansburg: Objected to as immaterial.

The Court: Sustained.

Exception.

2473 Q. Mr. Peterson, you have heretofore had present in court your valuation of the assets of the respective banks and, I think, the amount of deposits in each. Do you have with you the valuation of the respective banks in assets?

A. I think I have. (Witness produces it.)

2474 Q. You may refer to the Citizens State Bank of Potter and state the value as estimated by your Department of the remaining assets of that bank.

Mr. Sidner: Objected to as immaterial.

Mr. Smith: Object as immaterial.

The Court, Overruled.

Exception.

A. Yes.

By Mr. Campbell: The Intervenors would like the Elgin State Bank, the Humboldt State and the Custer State Bank of Broken Bow.

[fol. 571] By Mr. Abbott:

2488 Q. Mr. Peterson, do you know personally whether Mr. Schantz of the First State Bank of Omaha subscribed to and took any Guaranty Fund Certificates after May, 1927?

A. Yes; I presume you mean receivers' certificates?

2489 Q. Yes.

A. Yes.

2490 Q. Did he?

A. He did.

2491 Q. When and in what amount?

A. On July 14, 1927 he subscribed for $50,000 of receivers' certificates and they were delivered to him a few days afterwards.

2492 Q. Mr. Peterson, are you familiar with the passage by the meeting of the bankers in Omaha about the year 1926 of the following resolution: "We re-affirm our strict adherence to the Guarantee Fund Law, under which no depositor in any Nebraska bank has suffered loss. We are opposed to any change in the law which will in any wise tend to obstruct, hinder or delay any depositor in Nebraska"?

A. May I have the first part of the question?

2493 Q. Are you familiar with the passage by the meeting of the bankers in Omaha about the year 1926 of the resolution which I just read?

A. Yes, I remember of such a resolution, purporting to be passed at that time, yes.

[fol. 572] 2494 Q. Did you include that resolution in one of the publications you made up?

Mr. Sidner: Object as no foundation laid. Doesn't show he was present when it was passed.

The Court: Sustained.

Exception.

2495 Q. What meeting was that, Mr. Peterson, at which this resolution was purported to have been passed?

A. At the annual Convention of the Nebraska Bankers Association.

2496 Q. Were you there at the time?

A. I attended the Convention but I couldn't say I was there when the resolutions were adopted.

2497 Q. You included that resolution in one of your pamphlets?

A. Possibly so, but I don't recall right now.

It now being twelve o'clock noon adjournment was taken until one thirty p. m. of the same day, February 7, 1929.

One thirty o'clock p. m. February 7, 1929, Court convened pursuant to adjournment, trial was resumed, and the following proceedings were had and done, to wit:

Mr. Van E. Peterson resumed the stand for further direct examination by the defendants and, having previously been sworn, testified as follows:

By Mr. Abbott:

2498 Q. Your attention has been challenged, has it, Mr. [fol. 573] Peterson, to the fact you did include it in the pamphlet?

A. Yes, sir.

2499 Q. State, if you know, by whom and when and where that resolution was printed?

A. I took that part of the resolution from The Record, a paper published by the Nebraska Bankers Association and it referred to a meeting of the State Bankers Committee of the Nebraska Bankers Association and to this meeting held in Omaha August 12, 1926.

2500 Q. Of what subdivisions of the State Association did the individuals consist?

A. That committee was composed of a delegate from each county of the state, elected by the state bankers in each county.

2501 Q. The state bankers in each county held meetings and elected delegates to this meeting you referred to here in August?

A. Yes, sir.

2502 Q. Mr. Peterson, prior to adjournment I asked you to prepare certain data with regard to the specific banks

to which counsel for Intervenors added three other banks. Have you prepared that data?

A. I have.

2503 Q. And is the paper, Exhibit 35, which you now hold, the data?

A. Yes, sir.

2504 Q. And does that correctly reflect the particular facts as they appear in the records of your office?

A. Yes, they are our estimate of the cash value of the assets.

2505 Q. And referring to the words, "Total Liabilities" [fol. 574] of each bank, does that refer to the total liabilities to depositors?

A. Yes, and it might include some other liabilities, any liabilities of the trusts.

2506 Q. I will ask you what percentage, if you know, there would be in these respective items of other liabilities other than those to depositors?

A. There would be a very small percentage. Take for illustration the Scribner State Bank. We carry on our books an item of $7,800, the balance being all depositors' claims.

2507 Q. And would a similar situation approximately apply to each of the other banks listed?

A. Yes, sir.

Mr. Abbott: We offer Exhibit No. 35 in evidence.

Mr. Sidner: Object as immaterial.

The Court: Overruled.

Exception.

Exhibit No. 35 received in evidence, attached to and made a part of this Bill of Exceptions, appearing at page 589 hereof.

2508 Q. Mr. Peterson, do the records of your office disclose a separate list of the public funds of the State of Nebraska and its subdivisions in failed banks and banks in the hands of the Commission?

[fol. 575] A. The books themselves do not show a separate classification. However, we have prepared one.

2509 Q. Have you prepared from the data in your office such information?

A. Yes, sir.

Mr. Flansburg: We have admitted in our answer the deposit of public funds you set out in the cross petition of Mr. Stebbins, so I don't see there is any issue on it.

The Court: Overruled.

Exception.

Mr. Abbott: We offer in evidence Exhibit 36.

Exhibit No. 36 received in evidence, and is attached to and made a part of this Bill of Exceptions, appearing at page 590 hereof.

Mr. Gaines: Object to the list of banks and as only entitled to the list in the summary. Make no objection as to putting in the summary as prepared by Mr. Peterson. It is needlessly encumbering the record.

Mr. Abbott: We offer the sheet marked Exhibit 36 together with paragraph 1, paragraph 22, paragraph 50 and paragraph 51 of the sheets thereto attached, being the banks referred to in Exhibit 34 as banks whose depositors will be paid out of the current assessment now in litigation here.

[fol. 576] Cross-examination.

By Mr. Sidner:

2510 Q. How many banks have been turned over to you, to the Guaranty Fund Commission since the first of January, 1929?

A. Four.

2511 Q. Exhibit No. 34 shows, does it, where the assessment that is now being contested will be applied if the same is collected?

A. Yes, sir.

2512 Q. And in the order they are listed on that sheet, Exhibit 34?

A. Yes, sir.

Mr. Sidner: That is all.

Redirect examination.

By Mr. Abbott:

2513 Q. This list of four banks turned over to you in 1929, I take it you mean by that your Department received

them at that time; some of them, however, had been taken charge of by turning over to you in 1928?

A. I believe that is true; there was one or possibly two closed the last of the year.

2514 Q. Which now are in your possession?

A. I think that is true as to two of them.

Recross-examination.

[fol. 577] By Mr. Sidner:

2515 Q. But these four had not been included in the figures you gave us the other day as to the number of banks turned over to you by the Department of Trade and Commerce?

A. That is correct.

Mr. Sidner: That is all.

Cross-examination.

By Mr. Campbell, for intervenors:

2516 Q. Does paragraph 23 in Exhibit 36 clearly show the items therein set out as to the Elgin State Bank?

A. Yes, sir.

Mr. Campbell: Intervenors offer paragraph 23 of Exhibit 36 in evidence.

Mr. Sidner: Object as immaterial as it only applies to public moneys and was not offered by the Defendants.

The Court: I will accept it but I don't see where it is material.

Exception.

Paragraph 23 of Exhibit 36 received in evidence, is attached to and made a part of this Bill of Exceptions appearing on page 590 hereof.

2517 Q. Mr. Peterson, there are then, on deposit items from the State Treasurer, from the County Treasurer, Logan Township, etc. in that bank?

A. There were.

2518 Q. There were?

A. Yes, sir.

2519 Q. Have those been paid?

A. No, sir.

[fol. 578] 2520 Q. Mr. Peterson, do public funds such as those under paragraph 23 count in determining the average daily deposits of the Elgin State Bank in making an assessment?

A. They would.

2521 Q. Is it your understanding that public funds contribute to the total of the deposits upon which assessments are based?

A. That is true, unless they are otherwise secured.

2522 Q. Is that true with reference to the total of $2,005,228.35 shown as the total of public funds on the first page of Exhibit 36?

A. I couldn't say that would be true because those claims have not been adjudicated on the whole. The $990,000 of claims which was shown on the other Exhibit are adjudicated claims and ordered paid out of the Guaranty Fund. Those were not otherwise secured or the court would not have allowed them. It might have been possible that some of those claims in our going banks might have been secured and would not be claims in the Guaranty Fund.

2523 Q. Are you familiar with the facts as to whether public funds are included in making up total deposits?

A. No.

2524 Q. Then you are not speaking from personal knowledge?

A. I am from the adjudicated claims.

2525 Q. You refer to your allowance of claims but you are misstating my question. My question, Mr. Peterson [fol. 579] is this: Do the public funds that are in going banks count in making up the total deposits upon which assessments are based?

A. I believe I answered that before. They do count or should count and be reported unless they are otherwise secured.

2526 Q. Now, as a matter of practice, do you know of your own knowledge whether they have been included in making the basis for assessments?

A. No, I do not.

2527 Q. I see. Now, Mr. Peterson, is it your opinion, from your knowledge of the banks that are in the hands of the Commission that there would be losses in all of them?

A. There are losses in all of them, yes.

2528 Q. Now, upon the question of priority of payment of claims, by whom is that determined?

A. By the Courts.

2529 Q. You mean, as to whether they are preferred claims or not preferred claims?

A. Yes.

2530 Q. But now, having been determined by the different courts of the state that claims are preferred, then by whom is it determined as to which bank, which depositors, in these different banks are to be first paid?

A. I presume that would be the Secretary of the Department of Trade and Commerce.

2531 Q. You don't determine that?

A. No.

2532 Q. As far as you know, it is the Secretary of the [fol. 580] Department of Trade and Commerce?

A. Yes, sir.

2533 Q. And do you have at hand the total book value of the assets of failed banks that have been taken over under the Guaranty Fund Act?

A. I do not. Mr. Hotz asked for it just before lunch and I have not been back to the office since.

2534 Q. You can get the total book value?

A. Yes, I can get it for you.

2535 Q. And do you know the total payments that have been made under the Act, I mean payments to depositors?

A. I can only give that approximately.

2536 Q. Will you produce the total payments that have been made to the depositors under the Guaranty Fund Act?

A. I will; it will take some little time.

2537 Q. Maybe Mr. Bliss has that, I will see, Mr. Peterson.

A. I doubt if Mr. Bliss has that particular thing.

Mr. Campbell: That is all.

Witness excused.

(Here follows Exhibit No. 10, side folio 581)

[fol. 581]

EXHIBIT No. 10

State of Nebraska, Department of Trade and Commerce, Bureau

Statistics Relating to Depositors' Guarantee F

Report of Last Call Reports for the Years 1911 to 192

Date	No. of banks	Capital stock	Surplus	Net undivided profits	Total deposits	Other real estate owned	Total dividends paid to stockholders
Dec. 5, 1911	669	$12,827,240 00	$2,582,299 39	$1,724,469 27	$73,886,047 05	$211,001 37	Figures below w
Nov. 26, 1912	695	13,833,500 00	2,950,844 20	1,818,039 69	82,454,163 90	286,747 70	Rep
Oct. 31, 1913	695	14,455,100 00	3,295,242 03	1,729,459 69	91,738,896 74	352,434 21	
Oct. 31, 1914	719	15,798,100 00	3,807,242 84	1,857,808 81	93,490,843 95	428,572 39	
Dec. 9, 1915	762	17,118,600 00	4,170,852 50	2,234,466 71	114,470,498 08	534,475 15	
Nov. 17, 1916	809	18,461,300 00	4,713,018 46	2,628,597 09	165,507,506 95	580,817 25	
Nov. 20, 1917	842	21,056,300 00	5,383,109 58	2,925,914 11	223,469,644 05	622,791 64	
Nov. 1, 1918	928	22,210,800 00	6,266,807 29	2,924,063 97	240,264,131 65	606,585 88	
Nov. 15, 1919	937	24,881,800 00	7,400,255 30	3,797,555 21	276,429,320 93	641,450 88	
Nov. 13, 1920	1012	26,349,700 00	8,174,341 33	3,742,631 54	256,839,662 43	818,514 10	$1,545,533 48
Dec. 31, 1921	1010	25,699,800 00	7,954,163 56	1,051,998 12	204,886,633 74	1,541,575 78	968,586 70
Dec. 30, 1922	986	24,754,700 00	7,449,463 40	1,040,086 91	238,542,626 29	3,514,291 12	680,064 90
Dec. 31, 1923	938	24,300,700 00	7,070,117 31	1,512,383 19	242,965,383 55	6,217,645 03	591,140 06
Dec. 31, 1924	928	24,108,700 00	7,062,881 44	1,643,161 24	271,477,988 34	9,191,185 36	738,743 31
Dec. 31, 1925	872	22,482,700 00	6,736,397 92	1,154,274 37	272,367,328 23	10,794,120 19	877,260 41
Dec. 31, 1926	839	21,866,500 00	6,586,830 84	1,911,250 03	265,430,844 71	11,588,295 72	857,416 08
Dec. 31, 1927	793	20,648,500 00	6,327,996 66	2,077,474 40	261,311,586 83	11,494,098 79	866,470 43
Dec. 31, 1928	726	19,001,000 00	6,075,741 87	2,900,014 22	252,375,577 95	9,872,647 21	629,556 30
Totals							$7,754,771 67

The banks listed below for 1925, 1926 and 1927 were operated by the Guarantee Fund Commission as going concerns and are no

				†Profit account overdrawn		
Dec. 31, 1925	31	$855,000 00	$149,605 85	$588,783 68	$9,158,019 28	$1,424,474 21
Dec. 31, 1926	44	1,182,700 00	178,698 60	1,402,849 12	10,086,352 49	2,087,597 89
Dec. 31, 1927	62	1,615,700 00	216,942 01	1,673,699 17	13,150,075 19	2,366,971 50

† Represents losses and expenses paid in excess of earnings.

EXHIBIT No. 10

epartment of Trade and Commerce, Bureau of Banking, Lincoln

istics Relating to Depositors' Guarantee Fund

ast Call Reports for the Years 1911 to 1928, Inclusive

lts	Other real estate owned	Total dividends paid to stockholders	Total assessments paid by stockholders	Total losses charged off annually from sources other than assessments on stockholders	Total levies paid to guarantee fund	Total refunds to guarantee fund	Total drafts against guarantee fund
7.05	$211,001 37	Figures below were compiled from Special Report of 618 Banks			$176,863 36		
3.90	286,747 70				406,858 07		
3.74	352,434 21				271,806 68		
3.95	428,572 39				140,647 34		$54,526 17
3.08	534,475 15				144,684 92		
3.95	580,817 25				421,471 81		79,051 81
4.05	622,791 64				219,904 49		
1.65	606,585 88				318,028 79	$23,715 55	
0.93	641,450 88				802,476 74		
2.43	818,514 10	$1,545,533 48	$6,044 01	$366,109 35	639,243 93		737,709 25
3.74	1,541,575 78	968,586 70	175,961 24	719,205 29	2,317,807 70	35,550 09	2,697,222 35
3.29	3,514,291 12	680,064 90	258,378 24	852,400 02	1,971,579 92	370,927 42	2,172,765 40
3.55	6,217,645 03	591,140 06	225,435 75	901,517 17	2,046,320 39	182,658 71	2,061,961 62
3.34	9,101,185 36	738,743 31	220,056 51	913,874 84	1,004,860 01	193,286 78	1,010,025 65
3.23	10,794,120 19	877,260 41	404,738 29	986,751 39	1,616,329 85	533,700 11	3,586,093 35
4.71	11,588,295 72	857,416 08	164,843 27	1,093,116 13	1,672,338 75	427,282 82	2,625,757 27
5.83	11,494,098 79	866,470 43	196,458 12	1,356,931 72	1,653,206 76	157,219 92	2,270,436 26
7.95	9,872,647 21	629,556 30	454,766 72	1,158,042 49	885,412 60	257,716 76	1,256,909 74
		$7,754,771 67	$2,106,682 15	$8,347,948 40	$16,709,842 11	$2,182,058 16	$18,552,458 87

d Commission as going concerns and are not included in figures above.

0.28	$1,424,474 21
2.49	2,087,597 89
5.19	2,366,971 50

[fols. 582 & 583] EXHIBIT No. 22

December 31st Bank Call Report

The December compiled report compared with the same report of September 20th shows the continued ratio of reserve on hand in the average state bank of more than one third of the deposits in cash and bonds.

Loans are $180,000,000 compared with $182,000,000 in September. Deposits are $252,000,000 compared with $268,000,000 in September. Seasonable movement in corn and live stock is now taking place and will liquidate loans and increase cash and deposits.

Abstract of the Reports of the Commercial and Savings Banks of the State of Nebraska at the Close of Business December 31, 1928, 726 Banks Reporting

Resources

Loans and Discounts		$180,410,045.32
Overdrafts		423,531.20
Bonds and Securities		36,900,831.71
Judgments and Claims		994,194.24
Banking House, Furniture & Fixtures		6,174,432.86
Other Real Estate		9,872,647.21
Due From Banks		37,520,474.06
Cash		11,272,226.96
Bankers' Conservation Fund		442,386.67
Current Expenses, Taxes & Interest Paid		60,023.97
Total		$284,070,794.20

Liabilities

Capital Stock		$19,001,000.00
Surplus Fund		6,075,741.87
Undivided Profits		2,876,088.19
Dividends Unpaid		83,950.00
Individual Deposits Subject to Check	$101,224,713.88	
Demand Certificates of Deposit	9,210,500.98	
Notes and Bills Rediscounted		755,733.65

Bills Payable		2,872,275.55
Depositors' Guarantee Fund		30,426.99
Time Certificates of Deposit	115,360,753.33	
Savings Deposits	18,864,194.57	
Due to Banks	7,715,415.19	
		$252,375,577.95
Total		$284,070,794.20

[fol. 584] EXHIBIT No. 25

Department of Trade and Commerce

Bureau of Banking, Bureau of Insurance, Bureau of Securities, Bureau of Fire Prevention

Clarence G. Bliss, Secretary

[SEAL]

State of Nebraska, Adam McMullen, Governor

Lincoln, December 15, 1928.

Special Assessment

GENTLEMEN: In accordance with section 8028, Nebraska Statutes, as amended by House Roll No. 272, 1923 Session Laws, a special assessment of ¼ of 1% has been levied against all state banks of Nebraska to be credited to the Depositors' Guarantee Fund on or before December 26, 1928.

Your average daily deposits, shown by your statement of July 1, 1928, were $——.

¼ of 1% to be credited by you to your Depositors' Guarantee Fund by December 26, 1928, $——.

Very truly yours, Department of Trade and Commerce. Clarence G. Bliss, Secretary.

Received in evidence.

[fols. 585-587] EXHIBIT No. 26

Department of Trade and Commerce

Bureau of Banking, Bureau of Insurance, Bureau of Securities, Bureau of Fire Prevention

Clarence G. Bliss, Secretary

[SEAL]

State of Nebraska, Adam McMullen, Governor

Lincoln, March 29, 1928.

Special Assessment

GENTLEMEN: In accordance with Section 8028, Nebraska Statutes, as amended by House Roll No. 272, 1923 Session Laws, a special assessment of ¼ of 1% has been levied against all state banks of Nebraska to be credited to the Depositors' Guarantee Fund on or before April 3, 1928.

Your average daily deposits, shown by your statement of Jan. 1, 1928, were $——.

¼ of 1% to be credited by you to your Depositors' Guarantee Fund by April 3, 1928, $——.

At this time there is on deposit in state banks of Nebraska, to the credit of the Guarantee Fund $253,874.54.

This assessment will bring an additional credit to this account of about $650,000.00.

This will make a total credit to the Guarantee Fund of approximately $903,874.54.

At present there are outstanding receivers' certificates amounting to about 1,091,034.89.

Very truly yours, Department of Trade and Commerce. —— ——, Secretary.

[fols. 588-589a] EXHIBIT No. 34

As of Feby. 7, 1929

		Total
Rec. Ctfs.	Clinton State Bank	900
"	1st State Bank Hemmingford	2,000
"	Farmers State Bank Wolbach	2,200
"	Angora State Bank	4,000
"	Farmers State Bank Cotesfield	2,500
"	Dodge Co. Bank Hooper	1,900
"	Citizens State Bank Ralston	2,896.21
		15,496.21

Certified copy filed	Unpaid claims		Total	No. of claims
11-30-27	Citizens State Bank Potter	12000	12000	1
12- 9-27	Royal State Bank	8423508	9023508	112
12-10-27	1st State Bank Bazille Mills	5730006	10199504	11
12-16-27	Farmers State Bank, Rosalie	11979345	22175949	122
12-21-27	" Ansley	17651455	39827404	141
12-22-27	" Elba	15145963	54973367	79
12-23-27	Silver Creek State Bank	15752340	70725707	258
1-13-28	Farmers State Bank Ansley	10477	70736184	1
1-20-28	State Bank of Superior	58010522	128746706	...
				728
	Receivers Certificates	1549621		
	Claims without Superior	70736184	72285805	

Received in evidence.

[fol. 590] EXHIBIT No. 36

Public Funds on Deposit in Failed and Commission Operated State Banks in Nebraska Which are Unpaid December 31, 1928

Summary

1. County Treas. Accounts:		
Commission Operated Banks	$634,676.16	
Receiverships	562,240.68	
		$1,196,916.84
2. State Treasurer:		
Commission Operated Banks	$54,840.00	
Receiverships	106,178.92	
		$161,018.92
3. City or Village Treasurers:		
Commission Operated Banks	$128,583.30	
Receiverships	126,232.37	
		$254,815.67
4. Township Treasurers:		
Commission Operated Banks	$12,440.04	
Receiverships	11,653.87	
		$24,093.91

5. School District Treasurers:		
Commission Operated Banks	$162,324.73	
Receiverships	106,305.34	
		$268,630.07
6. Other Public Funds:		
Commission Operated Banks	851,535.64	
Receiverships	48,217.29	
		899,752.94
Total		$2,005,228.35

[fol. 591] Mr. Payson D. Marshall, called as a witness on behalf of the Defendants, after first being duly sworn, testified as follows:

Direct examination.

By Mr. Abbott:

2538 Q. State your full name.

A. Payson D. Marshall.

2539 Q. What is your occupation or business?

A. I am employed by the State of Nebraska as Chief of the Bureau of Banking in the Department of Trade and Commerce.

2540 Q. How long have you occupied that position?

A. Since December 1, 1926.

2541 Q. Immediately prior to that time, what was your business?

A. I was employed in the same Department as state bank examiner.

2542 Q. Regular or special?

A. Both; for about six months I was regular and about eighteen months special.

2543 Q. As special examiner what was the scope of your duties?

A. I was examining the banks that were in difficulty.

2544 Q. As Chief of the Department of Banking what were your duties generally?

A. Mostly correspondence relating to the recommendations of examiners. Part of the time to examination reports on Building and Loan Companies and Trust Companies.

2545 Q. And are the examinations made of the State

Banks of Nebraska under your immediate supervision?
[fol. 592] A. They are sent——

2546 Q. I mean after they arrive at the Department of Banking?

A. They are under my supervision together with the Secretary of the Department.

2547 Q. I understand you are under Mr. Bliss?

A. Yes, sir.

2548 Q. In the year 1927 was there any system of reports inaugurated to be made by the banks covering their earnings and other data?

A. Yes, sir.

2549 Q. When was that done?

A. Shortly after the first of January, 1927.

2550 Q. And when was the first report made under that new system?

A. For the six months' period ending June 30, 1927.

2551 Q. And when was the next report made under that system?

A. December 31, 1927.

2552 Q. And the third?

A. June 30, 1928.

2553 Q. June 30, 1928, and what you would call the last fiscal year in your Department?

A. It is the—Yes, I rather think that might be called the end of our fiscal year, the fiscal year of the state runs from June 30th to June 30th, I believe.

2554 Q. You have had your attention challenged, have you, Mr. Marshall, to Exhibits 6, 7 and 8, introduced as evidence in this case, prepared by Mr. Mooney?

A. I believe those are the numbers of the Exhibits I have
[fol. 593] seen.

2555 Q. Exhibiting them to you, are those the Exhibits to which you refer?

A. Yes.

2556 Q. Those exhibits have reference to the same period you have just referred to, the eighteen months' period commencing January 1, 1927 and ending June 30, 1928?

A. Yes, sir.

2557 Q. Have you, with the aid of your employees prepared a statement or compilation of the reports for that eighteen months' period covering all of the going banks of Nebraska?

A. Yes.

2558 Q. How many in number?

A. 726.

2559 Q. Those reports, Mr. Marshall, are in their general nature what type, whether they are earning reports or otherwise?

A. They are called "Reports of Earnings, Expenses and Dividends."

2560 Q. Calling your attention to Exhibit No. 9, is that one of the blank forms upon which these same annual reports you have referred to were made?

A. Yes.

2561 Q. Are there any reports of that nature for the period antedating January 1, 1927?

A. They are not made on this particular form.

2562 Q. What other reports incorporating any of that information are there?

A. There are some reports on file in the office on earn-[fol. 594] ings and expenses for the twelve months' period ending June 30, 1926; I believe they——

2563 Q. Yes.

A. —are not on this same form.

2564 Q. Now, in addition to the information disclosed by those reports did you make reference to other records and data in your office for the purpose of compiling other figures in this connection?

A. Yes.

2565 Q. And in doing so have you prepared a compilation that you have present with you in court?

A. Yes.

2566 Q. And has that compilation been checked subsequent to its preparation for accuracy and inaccuracy, carefully checked up and balanced?

A. It was checked up and balanced.

2567 Q. How many employees and how long a period did you put in on that, Mr. Marshall?

A. Why, we worked over a period of about two weeks and an average of about eight persons were employed during that time in the making of the report.

2568 Q. Does that report show the data individually with respect to each of the 726 banks?

A. Yes, as far as we had the reports on file.

2569 Q. Some of the reports ommitted some of the figures?

A. Yes, and a few reports had not been received in our office.

2570 Q. Now, after listing the data with respect to each [fol. 595] bank did you make a compilation, an aggregate sheet incorporating data as to all the banks?

A. Yes, sir.

2571 Q. Did you make any division in that respect as between the 726 banks in regard to whether they were organized before or after the year 1909?

A. Yes.

2572 Q. What did you do in that regard?

A. We totaled the various, the figures in the various columns according to the date of their organization, either before or after 1909.

2573 Q. Did you make totals of the data with respect to each classification and also with respect to the whole?

A. Yes.

2574 Q. On these report blanks that you referred to does the capital and surplus of the banks appear?

A. Yes.

2575 Q. I mean on these individual reports of the particular banks?

A. Yes.

2576 Q. What data or what reports did you take any data from other than the semi-annual reports of these banks?

A. We used the semi-annual average deposit statements and some of the quarterly reports.

2577 Q. What did you take from the quarterly reports?

A. The dividends paid during the eighteen months period ending June 30, 1928, the date of the last dividend paid.

2578 Q. And the amounts?

[fol. 596] A. And the amounts.

2579 Q. On these statements that you prepared, Mr. Marshall, is there any data other than the data that you copied and compiled from the sworn reports of the banks themselves made to your Department?

A. No.

2580 Q. You may produce this compilation that you have made, Mr. Marshall.

(Compilation produced and marked Exhibit 37.)

2581 Q. Is Exhibit 37 a true and correct reflection of the reports of these banks that you testified to?

A. I think so.

2582 Q. You may glance through it.

A. I think it does so.

2583 Q. Did you include in your compilation the state, county and city funds held by each bank?

A. Yes.

2584 Q. From what reports were those obtained?

A. From the quarterly reports.

2585 Q. The quarterly reports of the respective banks?

A. Yes.

2586 Q. After preparing Exhibit 37 did you prepare a recapitulation of the data disclosed by Exhibit 37?

A. Yes, sir.

2587 *A.* Handing you Exhibit 38 I will ask you to state whether you prepared that and whether it is the recapitulation to which you refer?

[fol. 597] A. Yes.

2588 Q. Is that a true statement and recapitulation of Exhibit 37?

A. Yes.

2589 Q. Mr. Marshall, have you referred to, noted Exhibits 6, 7 and 8 prepared by Mr. Mooney, the method adopted of preparing those three Exhibits, not the figures, I know you have been through the figures, but the method in which they were prepared?

A. I believe I understand the method by which they were prepared.

2590 Q. Do Exhibits 6, 7 and 8, for separate six months' periods incorporate the same banks?

Mr. Flansburg: Object as not the best evidence, each one shows the banks incorporated.

Mr. Abbott: Withdraw the question and as the privilege of challenging the Court's attention at this time to the fact that Exhibit 6 is made up for one six months' period, and Exhibit 7 for another and Exhibit 8 for another. Exhibit 6 took those in the red in that period and then the next six months' period, if one of the banks was in the black, dropped it and put in another one, so that the three Ex-

hibits do not correctly reflect the correct condition of the banks during that period.

Mr. Flansburg: The exhibits speak for themselves.

Mr. Abbott: We offer in evidence Exhibits 37 and 38. [fol. 598] Withdraw offer. I offer in evidence Exhibit 37.

Recess.

Mr. Sidner: No objection.

Exhibit No. 37 received in evidence, attached to and made a part of this Bill of Exceptions, appearing at page 609 hereof.

2591 Q. In your recapitulation, Exhibit 38, did you in addition to or as a part thereof compute some five items of percentage?

A. Yes.

2592 Q. Are those percentages as stated there correct with reference to the particular earnings to which reference is made and assessments?

A. They are.

Mr. Abbott: We offer in evidence Exhibit 38.

Mr. Sidner: No objections.

Exhibit No. 38 received in evidence, attached to and made a part of this Bill of Exceptions, appearing at page 610 hereof.

2593 Q. This recapitulation shows or states the capital and surplus, is divided as between the banks. I expect it would be just as well to hand it up and let the Court read it as for me to read it, if agreeable.

(Exhibit handed to Court and read by him.)

2594 Q. Mr. Marshall, during the period ending June 30, [fol. 599] 1928, were there certain banks reorganized in which capital stock assessments were paid in?

A. During the eighteen months' period ending that date?

2595 Q. Yes, sir.

A. Yes, sir.

2596 Q. And do you remember how many of those there were?

A. I don't remember the exact number. I believe there were seven.

2597 Q. Seven. Might there have been more?

A. There might have been more.

2598 Q. Seven that you know of?

A. Yes, seven that I know of.

2599 Q. And in those banks by that reorganization, what amount of paper was charged off in the reorganization?

A. Approximately $172,000.

2600 Q. In those seven banks?

A. In those seven banks.

2601 Q. And in making up Exhibits 37 and 38 have you put in that $172,000 as losses?

A. Yes, they are included in the column representing charge offs for that period.

Mr. Abbott: That is all.

Cross-examination.

By Mr. Sidner:

2602 Q. Mr. Marshall, will you have here on Monday morning a compilation of the following information from your reports, if you will take a note of it?

A. Have you any paper?

[fols. 600-602] 2603 Q. Yes. (Hands witness paper.) On the banks that you have listed on this Exhibit a statement of all statutory bad debts as shown by the examiner's reports on these several banks.

A. May I ask what you mean by statutory bad debts?

2604 Q. Your examiners' reports have listed upon them "Statutory Bad Debts" do they not?

A. Our call reports have that on.

2605 Q. Call reports or whatever you have.

A. Quarterly reports, I believe.

2606 Q. Your records will show that, will they not?

A. Yes.

2607 Q. Also a compilation of all requests for charge outs that have not been made as shown by your examiners' reports.

A. All of the requests for charge outs.

2608 Q. Yes, that will include notes, overdrafts, and real estate or judgments.

A. I don't know whether I can get all that by Monday morning.

2609 Q. Just for the last year or for the last six months. The last report that you have of each of these banks.

A. Just the totals?

2610 Q. I dont' care for the names of the banks. We want to protect the banks by not giving their names but you can designate them by number or something of that kind. And I ask that further cross examination of this witness be deferred until Monday so that we can examine the voluminous exhibits just introduced in evidence.

[fol. 603] The Court: I guess there is nothing more for the Court to act on so we can go on.

Mr. Abbott: That is all, Mr. Marshall.

Mr. Sorenson: The Defendants call the Court's attention to the message of Governor Arthur J. Weaver to the Legislature of Nebraska on the 4th day of February, 1929, with respect to the banking situation in Nebraska and in particular to that paragraph of his message in which he said:

"In taking stock of this whole situation, our officials and citizens should be firm in meeting the attack made upon our present laws by a large number of state banks. The operation of banks under the laws of Nebraska is based on a franchise right granted by the state. A corporation which has sought, obtained, and used such franchise cannot be heard to assert that it will keep only a part of the contract. It must operate under the laws of the state whatever they [fol. 604] are. Any modifications as to the present law should be made, not because modifications are demanded by the banks, but because the interest of the state will be better served thereunder. Until we go to a new basis for the new guarantee fund, the present rate of assessment should stand."

We ask the Court to take judicial notice of that.

Mr. Campbell: The Intervenors call the Court's attention to the farewell message of Governor Adam McMullen to the Legislature of Nebraska Forty-Fifth Session, on January 3, 1929, and particularly to his message upon banking conditions as follows:

"When the bank guarantee bill was under discussion by the legislature of 1909, the point was stressed that only the small depositor, such as the day laborer, the widow with her meager savings, and similar accounts, should come under its provisions, but as the bill passed it included all deposits of whatever size or kind. According to available records, the measure met the opposition of three-fourths of the state bankers. Counsel was retained by opposing bankers and the constitutionality of the law tested in the Federal Supreme Court. The law was sustained by that body in a decision rendered in 1911 and the state bankers have paid their assessments as levied annually until the second half of the special assessment for the year 1928 just [fol. 605] closed. On December 21, 1928, notice was served on the state that payment of the special assessment mentioned would be resisted and a restraining order asked of the courts on the ground that the assessment is confiscatory. While many state bankers opposed the law when it was first enacted, there were others who engaged in the banking business because of the law and in spite of the payment of assessments for nearly a score of years have been benefited to the extent that their banks have grown into large and substantial institutions. During the years of the development of their banks under the guarantee law, they were outspoken advocates of the equitable and protective features of the measure and emphasized the advantage of the depositor in having his account secured. However, when banks to be closed increased in number and losses to the guarantee fund grew in volume, it was the larger banks, those that formerly extolled the law, that first protested against paying their proportion of the special levy and proposed to other state bankers that organized effort be made to have the special assessment feature of the law declared null and void. These protestants assert their willingness to pay the regular assessment, which is one-tenth of one per cent, but are anxious to be relieved of the [fol. 606] special assessment constituting five-tenths of one per cent. If the courts hold the special assessment unconstitutional and the regular assessment is not increased to make up for it, the guarantee law is doomed. The regular assessment of one-tenth of one per cent brings approximately $250,000 annually, while the special assess-

ment of five-tenths of one per cent brings in $1,240,000 annually. Up to the present time interest has been paid on certificates of deposit to the amount of $600,000. Interest on receivers' certificates up to and including the year 1927 amounted to $625,000. The interest outstanding and unpaid on certificates of deposit in banks under the control of the Guarantee Fund Commission amounts to $600,000, while the interest on claims approved by the courts in receivership banks will approximate $700,000 per annum. From these figures it is distressingly evident that the amount paid in through the regular assessment of one-tenth of one per cent would equal only a fifth of the current interest charges.

"Since the guarantee law was passed, 264 banks have been closed and 129 banks have paid out in full. There are 135 banks in the hands of the Guarantee Fund Commission with deposits unpaid approximating $25,000,000. Of the 135 banks mentioned, 61 are under receivership with [fol. 607] court orders calling for $10,000,000 to effect liquidation. The 74 banks operated by the commission as going concerns represent deposits to the amount of $15,000,000. Pursuant to court orders no receivership certificates have been issued for more than a year, and the amount outstanding at this time is approximately $167,000.

"In 1909, before the guarantee law was in full operation, the 659 state banks reported $71,000,000 of deposits with a capital investment of $12,000,000. In 1920 with 1,012 banks reporting, there were $248,000,000 of deposits with a capital of over $26,000,000. In 1928 from the latest compiled report of the 739 state banks, there are $268,000,000 of deposits with a reserve in cash and bonds of over $97,000,000 and a total capital stock of $19,000,000. In other words, with 273 fewer state banks in 1928 than in 1920 and $7,000,000 less capital investment, the deposits have increased $20,000,000. The low reserve position of the banks of 1920-1921 compared to the large volume of deposits has been completely changed. The banks now show cash and bonds of $97,000,000, which when added to their commercial and feedlot loans, should enable the average state bank to pay one-half of its deposits practically on demand. Excluding the 61 banks in receivership and the 74 banks in the hands [fol. 608] of the Guarantee Fund Commission, together with

an estimated number that may be taken over in the future, it may be said that the remaining banks are stronger, more prosperous, more elastic and more able to meet demands than any time in the history of the state."

One paragraph further:

"So long as these bank losses remain unpaid, the guarantee law should not be repealed and its provisions should be protected from nullification. Depositors of failed banks are legally and morally entitled to their money. They have taken the word of the banks that their deposits would be secure and they have depended on the integrity of the state to see that the guarantee laws are carried out in good faith."

That is the concluding paragraph of the Governor's message on banking conditions.

Whereupon Court adjourned until the following Monday, February 11, 1929, at ten o'clock a. m.

[fol. 609] Exhibit No. 38 Received in Evidence

Recapitulation

(Exhibit 38, Page 610, Vol. 2, B. of Ex.)

Capital			
425 banks organized prior to 1909		$10,856,000.00	
301 " " 1909 and after		8,019,500.00	
Total 726 banks			$18,875,500.00
Surplus			
425 banks organized prior to 1909		$4,058,280.22	
301 " " 1909 and after		2,024,777.40	
Total 726 banks			6,083,057.62
Total Capital and Surplus 726 banks			$24,958,557.62
Total State deposits in 726 banks			$ 84,300.50
Total County deposits in 726 banks			10,230,619.10
Total City deposits in 726 banks			2,709,995.90
Total Dividends for all banks 12 months ending 12/31/27		$807,231.76	
Total Dividends for all banks 6 months ending 6/30/28		540,036.91	
Total for 18 months			$1,407,268.67
Total Net Profits after charge-off since organization to 6/30/28			

435 banks organized prior to 1869	$18,062,801.62	
291 " " 1869 and after	6227,088.43	
Total for 726 banks		$24,289,890.05
Total Net Earnings before set-offs, 18 months ending 6/30/28:		
425 banks organized prior to 1869	$2,450,067.50	
295 " " 1869 and after	1,739,420.01	
Total for 720 banks		$4,189,487.52
Gross Charge-off 18 months ending 6/30/28		
455 banks organized prior to 1869	$1,224,586.22	
291 " " 1869 and after	369,421.18	
Total for 726 banks		$1,594,007.40
Net Earnings after charge-offs, 18 months ending 6/30/28:		
70 banks organized prior to 1869	$1,474,608.22	
221 " " 1869 and after	1,019,910.72	
Total for 370 banks		$2,494,518.94
Net Deficit in earnings after charge-offs 18 months ending 6/30/28		
56 banks organized prior to 1869	$338,843.88	
70 " " 1869 and after	200,040.00	
(Total charge-offs in above 126 banks were $851,453.22, creating this deficit.)		
Total 196 banks		$538,883.88
Total Net Earnings after charge-offs 726 banks		$1,955,635.40
(See 1869-1901 Net Undivided Profits and Surplus)		
55 banks organized prior to 1869	$5,344,830.21	
201 banks organized 1869 and after	2,993,563.62	
Total 726 banks		$8,338,393.83
Percentage of Net Earnings before charge-off — 18 months ending 6/30/28 to Capital		
425 banks organized prior to 1869		27.49
295 banks organized 1869 and after		21.33
Percentage of Net Earnings after charge-offs — 18 months ending 6/30/28 to Capital		
70 banks [illegible] organized prior to 1869		10.30
221 banks [illegible] 1869 and after		10.360

Gross Earnings for year 1927 in 435 banks organized prior to 1900	$9,310,384.34
Gross Earnings for 6 months' period ending June 30, 1928, in 435 banks organized prior to 1900	4,997,139.78
Gross Earnings for year 1927 in 291 banks organized since and including 1900	6,359,891.23
Gross Earnings for 6 months' period ending June 30, 1928, in 291 banks organized since and including 1900	3,303,646.64
Total Gross Earnings 726 banks, 18 months ending June 30, 1928	$23,977,661.98
Total assessments paid into Depositors' Guaranty Fund by 726 banks for 18 months ending June 30, 1928	$2,412,324.78
Percentage of assessments paid into Depositors' Guaranty Fund to gross earnings of 726 banks totalling $23,740,077.47 for 18 months ending June 30, 1928	10.06%

(Fol. 621) Monday, February 11, 1929, ten o'clock a. m., court convened pursuant to adjournment and the following proceedings were had and done, to wit:

Mr. Payson D. Marshall, called by the plaintiffs for further cross-examination and having been previously sworn, testified as follows:

By Mr. Sidner:

2614 Q. Mr. Marshall, Exhibit 37 was compiled under your supervision and direction?

A. Yes.

2615 Q. You are familiar, are you, with manner of its compilation?

A. Yes, sir.

2616 Q. You take—are these sheets numbered in any way?

A. They have the numbers on the recapitulation sheet.

2617 Q. Will you take a pencil and number the work sheets so I will know which ones to refer to, maybe you better take ink.

A. Yes. (Witness marks sheets.)

2618 Q. In some of these compilations I find the figures in red. What does that indicate?

Mr. Abbott: I suggest that you make it more definite as to which figures in red.

Object as not definite.

2619 Q. Let the witness explain. I just asked——

The Court: He may answer.

Exception.

A. The red figures mean different things in different [fol. 622] columns.

2620 Q. Explain which column and what they mean.

A. In this column, "Gross Earnings Before Charge Offs for Eighteen Months ending June 30, 1928" the red figures mean that the operating expenses for that period exceeded the operating income for that period.

2621 Q. Before the charge offs were made?

A. Yes, before the charge offs were made.

2622 Q. All right, the next column?

A. "Net Earnings After Charge Offs, Eighteen Months ending June 30, 1928" means that the operating expenses plus the charge offs during that period exceeded the income during that period.

Mr. Abbott: I suggest the records show the witness is referring to page 3 of the Exhibit.

2623 Q. Are those columns carried uniformly through the entire work sheets?

A. I would say yes, for the periods as indicated.

2624 Q. Will you take that sheet now and tell me what columns you have on there and whether they run uniformly thereon.

A. What do you mean, uniformly?

2625 Q. All right, column one is what?

A. Name of the bank.

2626 Q. What I mean to say is, does column one through all these sheets comprise the same general information?

A. Yes.

2627 Q. Column two the same?

A. Yes.

2628 Q. Is that carried through consecutively, through all [fol. 623] these sheets?

A. Yes, in the same order.

2629 Q. Now, go ahead and explain what the red figures mean.

A. In all the columns?

2630 Q. Read the heading of the column and then tell what the red figures mean, as distinguished from the black figures. I imagine it would simplify matters if the columns were numbered.

Mr. Abbott: It is agreeable to us to have them numbered.

The Court: You may number them, it seems to be agreeable.

(Witness marks the columns.)

2631 Q. Now, handing you Exhibit 37 which column first shows red ink notations in the compilation?

A. "F."

2632 Q. You may explain what the significance of the figures in red are in column "F" on Exhibit 37.

A. In column "F" the red figures mean that the bank opposite which they occur had less net earnings since its organization to June 30, 1928 than its operating expenses plus charge offs.

2633 Q. In other words, the bank "Guardian State Bank", organized in 1919, showed that it had operated at a loss up to June 30, 1928, to the amount of the figures shown in red?

A. Including its charge offs, yes.

2634 Q. Charge offs are necessary, are they not?

A. No, I wouldn't say they are necessary.

2635 Q. Do you know of any way to get losses out of a [fol. 624] bank without charging them off?

A. Not if they exist.

2636 Q. Did you ever know a bank to operate without more or less loss?

A. Yes.

2637 Q. Take the next column, "G," what do the red figures signify in column "G"?

A. The red figures in column "G" signify the bank opposite which they occur had less operating income than operating expense before charge offs for the twelve months ending June 30, 1928.

2638 Q. What is the next column upon which red figures show?

A. "Q."

2639 Q. What is the significance of the red figures in column "Q"?

A. In column "Q" the red figures signify that the bank opposite which they occur had less operating income during the year 1927 than its operating expenses, before charge offs.

2640 Q. The next column upon which red figures show is what?

A. "T."

2641 Q. Explain the significance of the red figures in column "T"?

A. The red figures in column T signify that the bank opposite which they occur had less operating income than its operating expense before charge offs for the six months' period ending June 30, 1928.

2642 Q. The next column, column "U"?

A. The red figures in that column signify that the banks opposite which they occur had less operating income than operating expenses plus charge offs for the six months period ending June 30, 1928, for the twelve months' period ending June 30, 1928?

2643 Q. And the next column?

A. "V."

2644 Q. What is the significance of the red figures in column "V"?

[fol. 6251] A. They signify that the bank opposite which they occur had less operating income than operating expenses before charge offs for the six months period ending June 30, 1927.

2645 Q. What is the next column in which red figures show?

A. Column "X."

2646 Q. What is the significance of the red figures in Column "X"?

A. Shows that the bank opposite which they occur had less operating income than operating expenses after charge offs for the six months period ending June 30, 1927.

2647 Q. What is the next column in which red figures appear?

A. "Y."

2648 Q. You may explain the significance of the red figures in column "Y."

A. They signify, in regard to the bank which they occur opposite that the bank had less operating income than

operating expense before charge offs for the eighteen months period ending June 30, 1928.

2649 Q. Column "A-2," is that the next one?

A. Yes.

2650 Q. Explain the significance of the red figures in column "A-2"?

A. The red figures in Column "A-2" signify that the bank opposite which they occur had less operating income than operating expenses after charge offs for the eighteen months period ending June 30, 1928.

2651 Q. Column "A-3"?

A. In column "A-3" the red figures signify that on the bank's statement to the Department of Trade and Com- [fol. 626] merce they showed that expenses in excess of earnings was that amount.

2652 Q. And the expenses is greater than undivided profits and surplus, is that true, where it appears in red?

A. No.

2653 Q. Then in the Column "A-3" the surplus is shown separate from the undivided profits, is that correct?

A. Yes.

2654 Q. And the undivided profits is shown in figures above the surplus?

A. Yes.

2655 Q. Both, however, appearing upon the same line opposite the name of the bank?

A. Yes.

2656 Q. And where the figures in red exceeded the surplus it shows a capital impairment of the bank in its own report, is that correct?

A. Yes.

2657 Q. I notice on these sheets the name of a bank appears and then in several columns the words "Our report." What does that mean?

A. It means that the bank did not furnish us a report of earnings, expenses and dividends for the period indicated.

2658 Q. Did all of the banks that are now operating, except as herein shown, furnish reports for these periods?

A. Yes.

2659 Q. Taking this exhibit in your hand and coming to the line I am pointing to, how will you identify that line? [fol. 627] counting from the bottom?

A. Let's see.

2660 Q. I want this item here. I want to inquire about that line.

A. By running across——

2661 Q. I want to know the entries. I am going to inquire of you about the item appearing on the second blue line above the bottom on page 5. Does that identify the line I am pointing to?

A. Yes.

2662 Q. I notice under the column "Net Earnings" there is a naught appearing. What does that indicate?

A. That indicates that the bank reported that figure.

2663 Q. That there were no net earnings?

A. For the period indicated at the heading of the column.

2664 Q. And what does the star in front of the $1,000 indicate in the column under the heading of "Gross Earnings Before Charge Offs for Eighteen Months Ending June 30, 1928."?

A. That is for a twelve months period during these, during the eighteen months period ending June 30, 1928.

2665 Q. In other words, there was one six months period that bank did not report?

A. Yes, sir.

2666 Q. The red circle appearing in front of the $1,000 item in column "Gross Charge Offs Eighteen Months ending June 30, 1928 of page 5, what does that indicate?

A. That indicates that is the total for a six months period reported during the eighteen months ending June 30, 1928. However, in that case there is an error because it [fol. 628] is the same bank.

2667 Q. I am interested now in knowing, primarily, what the red circle indicates, the red circle in front of the figures?

A. I answered that in the first part of my answer.

Mr. Sidner: Strike out the latter part of the answer and my question.

2668 Q. That circle then would indicate that no report was made for the other two periods compiled in this Exhibit?

A. Yes.

2669 Q. And under column "A-2" Page 5, on that same

line there is a circle in that column; what does that indicate?

A. That is the amount of net earnings after charge offs for the eighteen months ending June 30, 1928 reported by that bank with the exception as indicated by the red star.

2670 Q. From that you would, from that compilation it would appear the net profits of that bank had been $1,000 in that eighteen months period and that the charge offs had been $1,000?

A. Yes, sir.

2671 Q. So that the charge offs exactly took up the profits, the operating profits of $1,000?

A. Yes, as shown by the bank's report to the Department.

Mr. Sidner: That is all.

Witness excused.

[fol. 629] Mr. Clarence G. Bliss, recalled by the defendants for further direct examination, having been previously sworn, testified as follows:

By Mr. Abbott:

2672 Q. Mr. Bliss, handing you Exhibit 39 I will ask you whether you identify that as one of the records of your Department?

A. Yes, sir.

2673 Q. It purports on its face to have been prepared for the Department of Trade and Commerce, of Lincoln, Nebraska. Do you identify that as a compilation of the records of your office?

A. Yes.

2674 Q. And did you produce that from the files of your office?

A. Yes, sir.

Mr. Abbott: Offer in evidence Exhibit 39.

Mr. Sidner: Object as incompetent, irrelevant and immaterial, no sufficient foundation laid, nothing to indicate who compiled it.

By Mr. Sidner:

2675 Q. I will cross examine. I would like to know who compiled it, who is responsible for it.

By Mr. Abbott:

2676 Q. I will ask a couple further foundation questions, Mr. Bliss, are there in your office reports of the state banks of Nebraska from which this compilation was made?

A. Yes, sir.

2677 Q. And have you seen and examined those reports?

A. Yes, sir.

[fol. 630] 2678 Q. Was that a special report, were those reports as indicated by the records of your office made in response to a special inquiry that went out covering the period incorporated in this compilation?

Mr. Sidner: Object to that as hearsay and not the best evidence.

Mr. Abbott: Withdraw the question.

2679 Q. Do you have under your control and have you recently noted the presence in your office of reports from the state banks in Nebraska covering the period from July 1, 1925 and on a form calling for the information incorporated in this Exhibit 39?

A. Yes, sir.

2680 Q. How many of those separate reports are there, Mr. Bliss?

A. It states right on it here, 845 banks.

2681 Q. There is a separate report for each bank, is there?

A. As it is stated there.

2682 Q. Have you seen the sheets in your office from which this compilation was made?

A. Yes.

Mr. Abbott: We tender the Exhibit in evidence.

By Mr. Sidner:

2683 Q. This compilation was made prior to the time you entered the office?

A. Yes.

2684 Q. Prior to the time you entered the office there was

no special reports called for showing the profits, net profits, etc. as there has been since you entered the office, is that correct?

[fol. 631] A. As far as I know, with this exception.

2685 Q. Were there special reports called for during that year?

A. Yes, from which this was compiled.

2686 Q. Have you checked those over to see if this compilation is correct?

A. A man in our office did that, I didn't do it personally.

2687 Q. This is a compilation from the records of your office?

A. Yes.

2688 Q. And who in your office made the compilation?

A. One of the men there, Mr. Corey.

2689 Q. Was that made before you went into the office?

A. Yes.

2690 Q. So that you yourself have not checked it to see if it is a correct compilation from the records of your office?

A. I have not checked each item but I have satisfied myself that the reports are there and this is made from it.

Mr. Gaines: Move to strike the answer as not responsive to the question.

The Court: Overruled.

Exception.

Mr. Gaines: Object to this on the ground it is remote, no proper foundation laid, witness showing it was compiled by someone else and not by him or under his direction.

The Court: I am inclined to think the one who compiled it should be produced.

Exception.

By Mr. Abbott:

2691 Q. Is this Exhibit 39 that you produced here one of the printed records of your office?

[fol. 632] A. Yes.

2692 Q. And are the report sheets upon which this synopsis is based, or this compilation based, now in your office?

A. Yes, sir.

Mr. Abbott: We again offer Exhibit 29 in evidence.

Mr. Sidner: Object as incompetent, irrelevant, and immaterial, no sufficient foundation laid, witness not having made this compilation from the records in his office.

The Court: Objection sustained.

Exception.

2683Q. Mr. Bliss, again referring to the matter of the reduction of the interest rate that might be paid on deposits by the Legislature of 1925, have you since you were on the stand before on that question caused to be compiled in your office under your supervision a list of the banks, state banks in Nebraska that were paying 5% on interest bearing deposits on December 31, 1924?

A. Yes, sir.

2684Q. And in connection therewith did you make a compilation of the interest bearing deposits in those banks on that date as disclosed by their reports?

A. Yes.

2685Q. And are you able now, from such examination of the reports of the banks themselves to state how many state banks in Nebraska were, on December 31, 1924, paying the maximum rate of 5%?

A. Yes, sir.

2686Q. And the amount of the interest bearing deposits (or 6%) in those banks?

A. Yes, sir.

2687Q. You may state the number of such banks.

Mr. Sidner: Object as incompetent, irrelevant and immaterial. No sufficient foundation laid. If the Court doesn't remember the foundation I desire to cross-examine on foundation.

By Mr. Sidner:

2688Q. Mr. Bliss, the reports that you have in your office from these banks simply show the maximum rate of interest paid, do they not?

Mr. Abbott: We stipulate that on time money.

By Mr. Sidner:

2689Q. It doesn't show the minimum rate paid, does it?

A. No.

2700 Q. And it doesn't show the average rate paid, does it?

A. There is no statement there only that the highest rate is 5%.

2701 Q. The question in the report is, what is the maximum rate of interest paid on time money and the answer shows 5%, is that correct?

A. No, it says the highest rate paid on time money.

2702 Q. And that is the only information shown on that report, is that correct?

A. Yes, sir.

2703 Q. And the lowest rate and the average rate are not shown on that report?

Mr. Abbott: Object as not competent at this time.

[fol. 634] The Court: Sustained.

Exception.

The Court: The objection of Mr. Sidner overruled at this time. Mr. Bliss may answer the pending question.

Exception.

(Question read to witness.)

A. Out of 928 banks reporting December 31, 1924, 646 banks reported that the highest rate of interest paid was 5% on time certificates and savings accounts covering a total deposit on which interest was paid of $110,520,583.74.

2704 Q. That was the amount of interest bearing deposits in those particular banks, those 646 banks?

A. Yes, sir.

2705 Q. Now, then, Mr. Bliss, are you familiar with the distribution, geographically, of those 646 banks?

A. Yes, sir.

2706 Q. Now, from your information gained from the reports of those banks and from your information gained as Secretary of the Department of Trade and Commerce and your experience as a banker and your familiarity with the records of the banks are you able to state, approximately, the amount of those interest bearing deposits in these banks that was carrying this rate of 5%?

A. Yes, sir, I am.

2707 Q. You may so state.

Mr. Sidner: Object as incompetent, irrelevant and immaterial, no sufficient foundation laid *d* on the edge of opinion evidence, no more foundation laid today than there was the other day when it was ruled out.

[fol. 635] The Court: I am inclined to think the objection should be sustained.

Exception.

2708 Q. Do you, Mr. Bliss, have personal knowledge gained in various ways, from which you are able to state the fact as to the approximate amount of deposits of these various banks upon which interest was paid on December 31, 1924 and immediately theretofore and immediately thereafter at the rate of 5% per annum?

Mr. Sidner: Object as incompetent, irrelevant and immaterial and has in it elements not proper for foundation question.

The Court: He may answer.

Exception.

A. What is the question again?

Question read.

2709 Q. That is, approximately?

A. I have personal knowledge of banks that I was familiar with in clearing items through them which would be in a small territory, that would be personal; I know that, and of course I have personal access to these files which we have just reviewed, I know what they say.

2710 Q. And in your contact with the activities of the State Bankers Association through that period did you come in contact with the bankers from various portions of the state and the question of interest rates?

A. Yes, sir, yes, sir.

2711 Q. And did you attend meetings in various portions of the state of bankers?

A. Yes.

[fol. 636] 2712 Q. And as a member of the State Senate for three sessions and the special session of 1925 did you have occasion to and did you learn from various sources

of information the range of rates in the various geographic subdivisions of the state?

A. Yes, yes.

2713 Q. And with the knowledge that you have gained in that connection and in the administration of your office are you able, in your judgment, to state with reasonable accuracy approximately what amount of interest bearing deposits there were December 31, 1924, bearing the maximum rate of 5%?

A. Yes, sir.

2714 Q. You may so state.

Mr. Sidner: Objected to as incompetent, irrelevant and immaterial, no sufficient foundation laid, showing clearly that a large majority is based on hearsay evidence and therefore incompetent.

The Court: I don't believe you have laid any foundation to justify this witness in attempting to give the amount which was bearing 5% rate and I sustain the objection.

Exception.

Mr. Abbott: Defendants and Intervening Defendant Stebbins offer to prove that practically all of the 646 banks that were paying the maximum rate of 5% on December [fol. 637] 31, 1924, were paying that rate on all interest bearing deposits other than public funds and bank balances.

Mr. Sidner: To all of which Plaintiffs object for the reason same is incompetent, irrelevant and immaterial and no sufficient foundation laid, calling for the conclusion of the witness and hearsay evidence.

The Court: Objection sustained.

Exception.

Mr. Sidner: Object further that the offer is broader than the question.

Mr. Abbott: Strike the offer and I will put it in a little different form.

The Defendants and Intervening Defendant Stebbins offer to prove by the witness on the stand that more than two-thirds of the interest bearing deposits of the 646 banks referred to were, on December 31, 1924, bearing interest at the rate of 5% per annum.

Mr. Sidner: Object as incompetent, irrelevant and immaterial, no sufficient foundation laid, the witness showing that any answer he makes must of necessity be based on hearsay evidence.

The Court: Sustained.

Exception.

2715 Q. Mr. Bliss, was there any reduction, appreciable reduction, in the interest bearing deposits of the State banks of Nebraska following the effective date of this act reducing interest on deposits?

[fol. 638] Mr. Sidner: Object as incompetent, irrelevant and immaterial unless it applies to the particular banks referred to in his other question.

The Court: He may answer.

Exception.

A. The time Certificates of Deposit December 31st?

2716 Q. Give us the total December 31, 1926.

A. The time Certificates on December 31, 1926, Certificates of Deposit $149,892,611.48.

2717 Q. Yes, and savings deposits?

A. $17,570,333.31.

2718 Q. The total of those two items?

A. Approximately one hundred sixty million.

2719 Q. That was December 31, 1926, after the law became effective?

A. Yes, sir.

2720 Q. And what was the total December 31, 1924, prior to the enacting of the law?

A. One hundred fifty-nine million and a fraction over.

2721 Q. Handing you Exhibit 40, purporting to be a report of the condition of the Nebraska State Bank of Grand Island as of June 30, 1927 and comparative growth in deposits for the ten year period preceding, I will ask whether or not you have checked that statement up with the records in your office?

A. I checked it up relative to the dates when reports were made; for instance, June 30, 1920 and June 30, 1927 were call dates. Some of those dates are not call dates.

[fol. 639] 2722 Q. Have you noted on the margin in lead pencil the amount on the call dates?

A. Yes.

2723 Q. And aside from that modification, is this Exhibit correct?

A. Yes.

Mr. Abbott: We offer in evidence Exhibit 40.

Mr. Gaines: No objection as far as that bank is concerned but as far as other plaintiffs is concerned it would be immaterial.

The Court: Objection overruled.

Exception.

Exhibit No. 40 received in evidence, is attached to and made a part of this Bill of Exceptions, appearing at page 683 hereof.

2724 Q. Mr. Bliss, calling your attention to Exhibit 41 you may state whether or not that is a comunication received by your Department from the Nebraska State Bank of Norfolk?

A. Yes, sir.

2725 Q. About the date of its date?

A. Yes.

Mr. Abbott: We offer in evidence Exhibit 41 for the printed matter attached to it.

Mr. Sidner: Object to the letter as incompetent, irrelevant and immaterial.

Mr. Abbott: I am offering Exhibit 41 consisting of four pages. It is offered for the purpose of showing the character of advertising that the bank was using at that time, [fol. 640] stating "All Deposits Guaranted" omitting the part that is a communication to the Department.

Mr. Sidner: Object to its materiality.

The Court: Objection overruled.

Exception.

Exhibit No. 41 received in evidence, is attached to and made a part of this Bill of Exceptions, appearing at page 684 hereof.

2726 Q. Mr. Bliss, challenging your attention to the requirements of Section 14 of the Guaranty Fund Act of 1909 providing for the filing in the Department with the State Banking Bureau of a statement by all the banks and pro-

viding that if the Bureau is satisfied with the report that it meets the requirements of this act that it may issue a certificate stating that the bank has complied with the laws of the state for the protection of bank deposits and that its deposits are protected by the Guaranty Fund of the State of Nebraska. Now, have you examined the records of your Department pertaining to the application for and issuance of certificates?

A Yes.

2727 Q How many certificates has your Department or the Department of Trade and Commerce issued under that particular section of the law? You may consult your memoranda.

A Our files show that 1141 such certificates have been issued.

2728 Q Do you have present in court a copy of the certificate that was issued to the Cheyenne County State Bank on [illegible]?

A Yes.

2729 Q Is Exhibit [illegible] a copy of such certificate?

A It is an original of that issued to me.

2730 Q Do your records disclose that the Alda State Bank filed its report under that act and received its certificate?

A Yes.

2731 Q And what certificate if any was issued the State Bank records?

A [illegible]

2732 Q [illegible]

A [illegible]

Mr. Wilcox offers in evidence Exhibit [illegible].

Mr. Sullivan: No objection.

Exhibit No. [illegible] received in evidence and made a part of this Bill of Exceptions, reading as follows:

2733 Q Calling your attention to Exhibit [illegible] state whether or not that is the report which was made by the Department and has been kept in your office at the time?

A Yes, sir.

Mr Abbott We offer Exhibit 47 in evidence

Exhibit No 47 received in evidence is attached to and made a part of this Book of Exceptions appearing at page [illegible] hereof

2788 Q And in the records of your Department Mr Rice is there shown between the effective date of the Grant Act viz 1st July 1912 and during the period up to about 1921 all of the lands then in existence occupied with the privileges and received certificates and have remained ever since fully and quietly

A Yes sir

2789 Q Mr Rice do you have present in court a sheet showing the amount of the assessments each regular and special levied in each year and the amounts raised by that assessment

A I am not that general report I have

2790 Q Handing you Exhibit 48 I will ask you whether that statement was prepared by you

A Yes sir

2791 Q And does that statement show all assessments according to the year levied and the amount raised each year

A Yes

Mr Abbott We offer Exhibit 48 in evidence

Mr Nathan Object as irrelevant it has been read into the evidence

The Court Overruled

Exception

Exhibit No 48 received in evidence is attached to and made a part of this Book of Exceptions appearing at Page [illegible] hereof

It now being [illegible] that such assessment was taken and the [illegible] of the same was [illegible]

[illegible] February 21 1920 and [illegible] and [illegible] assessment was [illegible]

sumed, and the following proceedings were had and done, to wit:

Mr. CLARENCE G. BLISS resumed the stand for further direct examination by the defendants and testified as follows:

By Mr. Abbott:

2738 Q. I note from Exhibit 37 introduced here in evidence that the Farmers and Merchants Bank of Ashland is the only bank not disclosing a deposit of some character of public funds during the period that Exhibit No. 37 covers. You examined your records, Mr. Bliss, to ascertain whether immediately prior to June 30, 1927 that bank was the depository of public funds?

A. Yes.

2739 Q. Have you a memorandum with you that you made up in that connection?

A. Yes, sir.

2740 Q. Prior to June 30, 1927 and during that year, what character of public funds did the Farmers and Merchants Bank of Ashland have on deposit?

Mr. Sidner: Object as immaterial.

The Court: Overruled.

Exception.

A. They had county funds and school district funds and municipal funds.

2741 Q. In what aggregate amount?

Mr. Sidner: Object as immaterial and irrelevant.

The Court: Overruled.

Exception.

[fol. 644] A. County, approximately $11,000. Municipal $1,800; School district, over $18,000.

2742 Q. Now prior to the institution of this suit and the notice of the fact that it was to be instituted were the state banks of Nebraska giving bonds for the public deposits, as far as your information goes?

Mr. Sidner: Object as immaterial, no sufficient foundation laid.

The Court: Overruled.

Exception.

A. No, they were not giving bonds for public deposits.

Mr. Abbott: You may cross examine.

Cross-examination.

By Mr. Sidner:

2743 Q. Mr. Bliss, you have been in the banking business prior to your acceptance of the position as the Secretary of the Department of Trade and Commerce, have you?

A. Yes, sir.

2744 Q. For how many years?

A. Twenty years.

2745 Q. And what bank or banks were you associated with?

A. I was President of the City Bank at Elm Creek.

2746 Q. Were you an executive officer of that bank?

A. Yes, sir.

2747 Q. Head of it?

A. Yes, sir.

2748 Q. And had been for twenty years?

A. Yes, sir.

[fol. 645] 2749 Q. You were appointed and took charge as Secretary of the Department of Trade and Commerce, when?

A. In February, 1927.

2750 Q. Who was your immediate predecessor?

A. Mr. Kirk Griggs.

2751 Q. Who was in the Department prior to his time?

A. Secretary Knudson.

2752 Q. He was from Genoa?

A. Yes, I believe.

2753 Q. And Mr. Griggs was from Hastings?

A. Yes, sir.

2754 Q. In answer to Mr. Abbott's question you said that the public officials had not been demanding bonds; to what time did you refer?

A. As far as I know, in connection with the department.

2755 Q. Do you know, that is the question?

A. Our records do not disclose of any bank giving bonds, as far as I know.

2756 Q. Did you look up the Fremont State Bank?

A. Not lately I haven't, no, I did not, no, sir.

2757 Q. As a matter of fact, have they not been giving security for public money for over a year?

A. They may have been.

2758 Q. Did you look up the State Bank of Omaha?

A. No, I did not particularly.

2759 Q. And don't you know as a matter of fact they have been giving bonds for over a year?

[fol. 646] A. I didn't know it until I heard the testimony here.

2760 Q. How did you get the information from which you are testifying here, from just what you heard?

A. From the fact that the state banks, under the statute aren't required to give bond and don't do it.

2761 Q. That is the reason you answered as you did?

A. Yes, sir.

2762 Q. Do you know of any other counties outside of Dodge and Douglas counties that require bonds?

Mr. Abbott: Objected to as not specific as to time. I confined my time to prior dates. Of course many are requiring bonds now, we know that.

The Court: Objection sustained.

Exception.

2763 Q. When did you get this information?

A. The only information that I have received at all that any banks have been putting up bonds has been the information disclosed here in this case, on the witness stand. Other than that the banks over the state, until this matter came up lately, have not been giving bond for public funds.

2764 Q. How did you get that information?

A. As a matter of general record in our office, correspondence, examiners' reports and the general records there.

2765 Q. Have you examined the examiners' reports to see how many of them, prior to December 31, 1928, were giving bond?

A. I have seen all those reports and I don't recall anywhere that they do give bond.

[fol. 647] 2766 Q. Did you find anywhere they say that they do not give bond? That matter as to whether they give bond, it doesn't say that they do or don't on the reports you received up to December 31, 1928, is that a fact?

A. Yes.

2767 Q. And no questions of that kind are asked by you of the banks, is that a fact?

A. Not directly, not directly.

2768 Q. So that you are relying, in answering all of Mr. Abbott's questions, upon the provision of the statute? Isn't that a fact?

A. Yes, sir.

2769 Q. And upon no definite information that you had?

A. Upon that and my general knowledge that the banks do not give bond.

2770 Q. I am trying to ask you how you get that knowledge, from reports?

A. If they had to give bonds they would pledge security from the bank and there is nothing in those reports that shows that.

2771 Q. Don't you know surety bonds are given without the pledging of collateral?

A. That would be true if they carried surety bonds.

2772 Q. Is it true?

A. Is what true?

2773 Q. That if they gave surety bonds? So that if they gave surety bonds there would be nothing your Department would know about it other than you might hear about it?

[fol. 648] A. Yes, sir.

2774 Q. As a matter of fact, prior to the first day of December wasn't many counties demanding bond, to your knowledge?

A. They were at that immediate time but they hadn't been doing it very far previous to that.

2775 Q. But how far previous to December 31, 1928?

A. Not over two or three months.

2776 Q. As a matter of fact they commenced demanding bonds in September, 1928.

A. Not most of them but some.

2777 Q. Some had demanded [illegible] more than a year prior to that time?

A. That might have been [illegible] matter, but very few.

2778 Q. And the State Treasurer, in the first part of December, 1908, was asking for bonds prior to the first of December, 1908, was he not, for bonds to protect funds?

Mr. Abbott: I object to the question as calling for the opinion [illegible] to show what the State Treasurer is doing.

The Court: He may answer.

Exception.

A. I am not [illegible] Treasurer.

2779 Q. Did he not, in the month of [illegible] prior to December first, 1908, have to ask for bonds?

A. I think there was sufficient [illegible] applies from that time on.

2780 Q. As a matter of fact, are not all public officials demanding bonds for public funds from the banks?

[fol. 649] Mr. Abbott: Objected to as immaterial.

The Court: He may answer.

Exception.

A. No, I don't think all are.

2781 Q. Practically all are?

A. I will say a good many are.

2782 Q. Do you know of any county, city or school district that is not demanding bonds at the present time?

A. I know of banks writing in and saying they have been asked for bonds, I think, I presume they are not demands.

2783 Q. How long ago was that?

A. Within the last month.

2784 Q. One or two instances?

A. Probably several instances.

2785 Q. Now, you remember of an article appearing in the Nebraska Journal, do you, along the latter part of November or the first week in December in which the facts about the Guaranty Fund were given, the alleged facts about the Guaranty Fund?

A. I believe I heard of it.

2786 Q. You didn't see that in the paper?

A. I have seen so many articles, I don't recall it particularly. I think I saw it if it was published, yes.

2787 Q. About that time?

A. Yes.

2788 Q. And that is the article that referred to the Guaranty Fund being fifteen millions behind, is that correct?

Mr. Abbott: Objected to as incompetent, immaterial and [fol 650] irrelevant and not proper cross examination.

The Court: He may answer.

Exception.

A. I don't recall the amount but as I recall it showed the Guaranty Fund had a big deficit.

2789 Q. And it showed it around that figure?

A. I think it did.

2790 Q. Did it not state in so many words that the Guaranty Fund was insolvent?

Mr. Abbott: Objected to as not the best evidence, incompetent, irrelevant and immaterial.

The Court: He may answer.

Exception.

A. I don't recall that part, of its being insolvent.

2791 Q. And did it not say in substance and effect that it would take all of the assessments to pay the interest upon the indebtedness at the present time?

Mr. Abbott: Objected to as incompetent, immaterial and not proper cross examination.

The Court: He may answer.

Exception.

A. It did say something about the interest.

2792 Q. And to that effect, did it not?

A. Along that line, yes, sir.

2793 Q. Because if interest is payable it would take it, would it not?

Mr. Abbott: Objected to as not proper cross examination, calling for conclusion of the witness.

The Court: Objection sustained.

Exception.

[fol. 651] 2794 Q. You referred to the Farmers and Merchants Bank of Ashland not having public funds. Have they refused to accept public funds, or why were they not in Exhibit No. 37?

A. The reason was because that report didn't show they had any public funds.

2795 Q. Since June 30, 1927, to the time that Exhibit was made up to, they had no public funds on hand, is that correct?

A. That is as their sheets disclosed in connection with that report.

2796 Q. Mr. Bliss, will you refer to those two certificates you identified this morning, Exhibits 42 and 43, I think you said Exhibit 43 was the one that was used for a time by your Department. Up to what time was Exhibit 43 used?

A. Until the bank that it was issued to was taken over.

2797 Q. Was the form of certificate issued by your Department changed?

A. It apparently has been, some.

2798 Q. When was the form changed from Exhibit 43 to the form Exhibit 42?

A. I don't know, I never checked that up.

2799 Q. Has Exhibit 42 been in use during the entire time that you have been Secretary of the Department of Trade and Commerce?

A. Yes, sir.

2800 Q. So that the change was made sometime prior to your entry into office?

A. Yes, sir.

2801 Q. Then you don't know the reason for the change in form?

A. No, I do not.

2802 Q. Are you familiar with the provisions of the law, [fol. 652] the requirement of the law for that certificate to be placed in a conspicuous place in the bank?

A. Yes, sir.

2803 Q. And in sending out those certificates do you call the attention of the banker to that section?

A. We have not had occasion to send out many of them, only with a new charter, just a few of them and we always point it out to them.

2804 Q. Always tell them it must be posted in a conspicuous place?

A. We always tell them it is issued in connection with a certain section.

2805 Q. Of the Statutes?

A. Yes.

2806 Q. And state the requirements of your office, that they comply with the provisions of the law?

Mr. Abbott: Object as incompetent and immaterial he can't add to the law.

The Court: He may answer.

Exception.

A. I would say yes. We try to enforce the laws.

2807 Q. Is it not the purpose of that certificate being displayed that the people may know they complied with the law?

Mr. Abbott: Object as calling for conclusion of the witness, not proper cross examination and incompetent and immaterial.

The Court: Overruled.

Exception.

A. Yes, I presume so.

2808 Q. You referred in your direct testimony to the Guaranty Fund Commission. Of whom is that composed at [fol. 653] the present time, can you tell us, that is the members of that Commission?

Mr. Abbott: Object as not proper cross examination. He hasn't been interrogated by the Defendants with respect to any of those matters.

The Court: Objection sustained.

Exception.

2809 Q. Mr. Bliss, what official position do you hold besides that of Secretary of the Department of Trade and Commerce?

A. The office duties provide that I shall be chairman ex officio of the Commission.

2810 Q. And as such chairman do you have any duties with reference to failed banks?

Mr. Abbott: Objected to as not proper cross examination.
The Court: He may answer.

Exception.

A. None, other than to preside over the Commission when they meet in a body.

2811 Q. Do not all official acts of the Commission require your approval as chairman of the Commission?

Mr. Abbott: Objected to as not cross examination, incompetent and immaterial.
The Court: He may answer.

Exception.

A. They require my countersigning. I wouldn't say it was approval but it has to be countersigned by me.

2812 Q. To be legal it has to be countersigned. Doesn't that mean if you sign it you have to approve it or do you sign it without approving it?

A. I always have the record of the Commission before me, they sign first and approve it before I sign.

[fol. 654] 2813 Q. But it is official after you sign it?

A. Yes.

2814 Q. And you are the last one to approve it before it is an official order?

A. Yes.

2815 Q. Has that been true with that Department for the last several years?

A. As far as I know.

2816 Q. Yes. You referred to your activities as a member of the Legislative Committee of the Nebraska Bankers Association, didn't you, in your examination in chief?

A. I believe I said I wasn't a member of the Legislative Committee.

2817 Q. You were in the Legislature, however, in 1925?

A. Yes, sir.

2818 Q. And on the banking committee?

A. Yes, sir.

2819 Q. Who appeared before that Committee on Banking, urging a reduction of the interest rate on time deposits? Give us their names?

A. There were a number of bankers appeared but I be-

lieve I stated I would not be positive of any particular ones.

2820 Q. On your direct examination you referred to Mr. McLucas and Mr. Dan Riley?

A. I think I said they were the type of bankers represented because they were 4% banks.

2821 Q. Did anybody appear before your Committee, as far as you know now, who was paying more than 4% at that time?

A. I couldn't say as to that point.

2822 Q. Do you know of anyone?

A. Yes, I recall some of the banks from my district out [fol. 655] home.

2823 Q. Give us the name of one man.

A. Mr. Kirk of Gibbon.

2824 Q. Mr. Kirk at that time was on the Guaranty Fund Commission.

A. Not in 1925. In fact, all the members of the Guaranty Fund adopted a resolution requesting the adoption of the 4% rate.

2825 Q. Those were the members of the Guaranty Fund Commission over which you now, as Secretary of the Department of Trade and Commerce, preside?

A. Some were; some have now resigned.

2826 Q. They took official action as members of the Guaranty Fund Commission?

A. Yes, they asked for the 4% rate.

2827 Q. What bankers in their individual capacity came here and asked that?

A. There have been so many bankers before us I couldn't undertake to name them.

2828 Q. Did Mr. McLucas appear before your Committee?

A. I am pretty sure he did. He is a 4% bank, never has been up to 5%.

2829 Q. Did Mr. Dan Riley?

A. I can tell if he has ever been a 5% bank. Yes, he was a 5% bank.

2830 Q. At what time?

A. In 1924.

2831 Q. Was he in 1925?

A. I wouldn't be positive in that regard.

Mr. Abbott: Object as having already been covered.

The Court: Objection sustained.

Exception.

2840 Q. Is that an official document issued from your office?

Mr. Abbott: Object as having been already gone over.

The Court: Overruled.

Exception.

Fund Commission collects from the sale of the assets of receivership banks, where the depositors have been paid. That money is refunded to the solvent banks.

2849 Q. Now, what do you mean by refunded?

A. The proportion that belongs to each bank in accordance with its——

2850 Q. But what do you mean, refund the money to it or deposit it to your credit? Instead of refunding it, it is simply redeposited to the credit of your Department, is that right?

A. Yes.

2851 Q. So that the bank doesn't get any credit other [fol. 659] than those deposits in their bank?

A. They would get some credit if the amounts got high enough so it would run over 1%.

2852 Q. If they had deposits with them and with all other banks over 1%?

A. Yes, sir.

2853 Q. But that could only occur after the fifteen million deficit now existing has been taken care of.

A. No, not fifteen million; the court orders that we have is all we take notice of.

2854 Q. And they are over ten millions, practically eleven million, are they not?

A. Yes, sir.

2855 Q. Did the banks get from your Department any other information at the time of this assessment in March, 1928, showing the situation with reference to the Guaranty Fund?

A. Not that I recall.

2856 Q. Have you ever compiled any records of the condition of the Guaranty Fund and sent it to the banks, other than Exhibit 26?

A. I think it has been customary for the Department to make a statement, to write them. You will find it in previous letters that have gone out.

2857 Q. Do you have any other ones with you here?

A. It has been customary to state the amount on hand in the banks and what they were going to do with the money.

2858 Q. Has your Department ever permitted anyone to investigate the reports made by the banks to you or the reports of the examiners made to you on the condition of these state banks?

[fol. 660] Mr. Abbott: Object as not proper cross-examination, we did not go into this question.

The Court: Overruled.

Exception.

A. I don't recall any cases of that nature, only in connection with that Exhibit 4.

2859 Q. In the preparation of the Exhibit 4 did you give the bankers any access to your bank examiners' reports on the other state banks?

Mr. Abbott: Object as not proper cross-examination, and answer will carry the wrong inference.

The Court: He may answer.

Exception.

A. None other than what I have testified to. Our Department made up some memoranda from the examiners' reports.

2860 Q. So that all this bankers' committee saw was what was made up by your Department and shown on the bottom of Exhibit No. 4?

A. Yes, sir.

Mr. Abbott: Objected to as not proper cross-examination and gone over by their case in chief.

The Court: The answer is made so there is no use objecting now.

Mr. Abbott: Move to strike out the answer of the witness until the objection can be ruled on.

The Court: Let the answer stand and overrule the objection.

Exception.

[fol. 661] 2861 Q. Did you ever, at any time, furnish information other than you have testified to as to the condition of the banks under your jurisdiction?

A. No.

2862 Q. You testified to something occurring in September, 1928, at which time you said the public officials commenced asking for bonds. What happened at that time?

A. Why, in connection with the Guaranty Law I would say that September, 1928 was the time or the month that

we had the State Bankers Association in Omaha and the President announced the bankers were not going to pay the next assessment. That might be the basis.

2863 Q. Was that the time that the Department gave out a statement of the condition of the fund?

A. September, 1928, I don't recall of the Department giving out any statement.

2864 Q. Did the Guaranty Fund Commission direct Mr. Peterson to give out at that time a statement of the Commission?

A. I believe that is so, in connection with a partial audit.

2865 Q. And that statement given out by him in September, 1928, showed Deficit of about ten millions and a probable deficit of about five million dollars more, did it not?

Mr. Abbott: Object as not proper cross-examination and not the best evidence.

The Court: Sustained, on the ground not the best evidence.

Exception.

2866 Q. That was a report made by a Department under your jurisdiction?

[fol. 662] A. Not that I recall. It might have been some statement of Mr. Peterson's or some of the officers over there but not that I knew about particularly.

2867 Q. But you knew of such a statement being published in the paper?

Mr. Abbott: Objected to as not the best evidence and not proper cross-examination.

The Court: Overruled.

Exception.

A. I don't know of any particular statement. I know of a number of statements made in the papers at that time, there was quite, there was considerable in the papers at that time.

2868 Q. And part of it was from the Guaranty Fund Commission?

A. Some statements made by them.

2869 Q. What statements did you see in the paper?

Mr. Abbott: Object as not the best evidence, not proper cross-examination.

The Court: He may answer.

Exception.

A. I don't recall any particular one, unless I had some press items here. There was a number of items in the press at that time.

2870 Q. What were those items about?

A. Oh, estimating the condition of the Guaranty Fund by some statements of the different members and help over there in that Department.

2871 Q. And in September, 1928, was that the first time you knew of the condition of the Fund being published?

A. No, I think there was something published as far back as June.

[fol. 663] 2872 Q. 1928?

A. Yes.

2873 Q. That is as far back as you know of the condition being made public?

A. As far as I recall.

2874 Q. How extensive were the publications made in June, 1928?

A. I have in mind—— (interrupted)

Mr. Abbott: Objected to as not proper cross examination and the witness not having indicated knowledge as to the extent of the publicity.

The Court: He may answer.

Exception.

A. I have in mind an address or speech made by one of the members, I believe it was made by the counsel for the Commission, published here in Lincoln in June. It was published to quite length in the press.

2875 Q. You refer to the counsel for the Commission, to Judge Skiles, the attorney for the Commission?

A. Yes, sir.

2876 Q. That was published generally here in Lincoln, was it, that speech?

A. I believe it was published in the Lincoln papers and it was published in some of the farm papers, I know.

2877 Q. Was it published in the Nebraska Farmer?

A. I don't know. I saw it in the Des Moines Register.

2878 Q. It was published widely through the state?

A. Yes.

2879 Q. Was that the first report you know of being pub-
[fol. 664] lished as to the condition of the Fund?

A. I think so, it is the first I recall.

2880 Q. Now, at that time or soon after you reported to the banks under your supervision the condition of the Fund?

Mr. Abbott: Objected to as immaterial, not proper cross-examination.

The Court: He may answer.

Exception.

A. I think that when we made the similar letter for the July assessment at the bottom of that letter was a statement of the money.

2881 Q. That would be the regular assessment?

A. The regular assessment in July.

2882 Q. Have you got a copy of that here?

A. Not here; I can get you a copy.

2883 Q. Will you produce it?

A. Yes.

2884 Q. Have the banks any way of obtaining information as to the condition of other banks except through your Department?

A. We haven't any—we have always regarded our examination reports as confidential and haven't undertaken to disclose anything from our Department.

2885 Q. In 1927 did you send out a circular letter or a circular requesting or asking the banks to sign in which they would agree not to nationalize?

A. Not directly from our Department; it was sent out from the Guaranty Fund Commission office.

2886 Q. Didn't you and Mr. Peterson go around to different meetings of bankers and present that form and ask them to sign?

[fol. 665] A. It was adopted by the state bankers in a state bankers' group meeting. They adopted it and we prepared it and presented it.

2887 Q. And in connection with that request was not Exhibit 4 presented and read to the different bankers in their group meetings?

A. If it wasn't it was mailed out to them prior to the meeting. I will say it was mailed out by the Commission office and it is my understanding they received it.

2888 Q. And as a part of that plan did you not tell the bankers in those meetings that the total liabilities would not exceed $7,100,000?

A. We probably didn't say it in that language. We said it was estimated that the losses would be that. Of course, that was our idea of it. It is covered there in that letter.

2889 Q. Handing you Exhibit 45, you may examine that and tell us whether that is the resolution you referred to?

A. Yes, sir, that is one of the resolutions that was presented at the meetings with the state bankers.

2890 Q. This was designed for each individual bank, was it?

A. Yes.

2891 Q. And was presented in connection with your report, Exhibit 4 to the bankers out over the state?

A. It was presented with Exhibit 4, not my Exhibit 4, but with Exhibit 4.

Mr. Sidner: Offer in evidence Defendants Exhibit 45.

[fol. 666] Mr. Abbott: Object as this is part of counsel's case in chief and the Plaintiffs having heretofore rested we object to this line of testimony tending to introduce evidence as a part of their case in chief.

The Court: Overruled.

Exception.

Exhibit No. 45 received in evidence, read to the Court by Mr. Sidner, is attached to and made a part of this Bill of Exceptions, appearing at page 688 hereof.

2892 Q. Mr. Bliss, you testified that in 1925 there were two banks that changed from National to state. Can you tell us if one of those was the First National Bank of Dodge?

A. Our files disclose that a new charter was issued to the Dodge State Bank at Dodge.

Mr. Abbott: I suggest for the purpose of accuracy that the witness look up and see what the two banks are.

(Witness looks through book.)

A. The record shows here two banks changed from national to state but don't give their names. There was two converted to national banks.

2893 Q. In your testimony you said there was two national banks converted to state banks in 1925 and I was asking if you could tell me what those banks were?

A. I can't from the records right here but I can get it from the office.

[fol. 667] 2894 Q. All right, if you will furnish that for me, please. In answer to Mr. Abbott you testified this morning that 646 banks in December, 1924, reported a maximum of 5% paid on time money. Can you tell us how many of those banks, those 646 banks reporting in December, 1924 the payment of 5% maximum have been taken over by the Department of Trade and Commerce and held by it in receivership for liquidation or are still operated by the Guaranty Fund Commission as going concerns or have subscribed an amount equal to their capital to restore them to financial standing?

Mr. Abbott: Object as not tending to prove any issues adduced in this case.

The Court: Overruled.

Exception.

A. I couldn't give you those figures. Our records disclose all the banks that reported that 5%. I can give you that and then check back and see which ones are listed with the Guaranty Fund Commission.

2895 Q. Now, Mr. Bliss, don't you know that practically all your failures came from that list of banks?

Mr. Abbott: Object as calling for conclusion of the witness and not proper cross examination.

The Court: I do have some doubt as to whether it is cross examination but as it is not material I will let him answer.

Exception.

A. No, I dont' know that. I would assume that some of the banks we closed paid 5%.

2896 Q. Have any of them you have closed paid less than 5%?

[fol. 668] A. I wouldn't know that without looking it up.

2897 Q. What is your best judgment, now?

Mr. Abbott: Object as witness has already answered.

The Court: Sustained.

Exception.

2898 Q. Will you look it up and give us that information?

A. Yes, I can. You want me to find out the closed banks and what they paid in 1924?

2899 Q. Yes, I want the banks closed since 1924, what rate they paid and those who have had to restore capital.

Recess.

2900 Q. Mr. Bliss, your home town is right west of Grand Island, is it not?

A. Yes, forty miles.

2901 Q. You were quite familiar with the Nebraska State Bank at Grand Island?

A. Is that Mr. Gaezel's bank?

2902 Q. Yes. Are you?

A. Yes, sir.

2903 Q. Were you familiar with his advertising as early as December 31, 1926, with reference to the Guaranty Fund?

Mr. Abbott: Object as not proper cross examination.

The Court: He may answer.

Exception.

A. I don't recall of ever seeing it.

2904 Q. Don't you know that on or about that time that he was advertising generally in the Grand Island paper that he was not relying on the Guaranty Fund?

[fol. 669] A. No, I don't know it.

2905 Q. Would you say he did not make it?

A. No, I didn't say that, I said I didn't know about it is all.

2906 Q. Would that advertising refresh your memory at all?

A. That is the first time I have heard of it.

Mr. Sidner: That is all.

Redirect examination.

By Mr. Abbott:

2907 Q. Mr. Bliss, this Exhibit 4 that has been referred to here and the resolution, Exhibit 45, were included with two other sheets in your letter, was it not?

A. They was mailed out to the banks by the Commission, not by my office.

2908 Q. And that was a part of an arrangement on the part of the banks, certain banks that had met here in Lincoln, that they would take a quantity of the receivers' certificates provided 75% of the banks in Nebraska would participate?

Mr. Sidner: Object as not proper redirect examination, calling for conclusion of the witness as to what the agreement was.

The Court: Overruled.

Exception.

A. Yes.

2909 Q. Do you know when they were mailed out?

A. I think it is on the letter.

[fol. 670] 2910 Q. I will ascertain: mailed out in August, 1927?

A. Yes, sir.

2911 Q. By whose office?

A. The office of the Guaranty Fund Commission.

2912 Q. And to each bank in the state?

A. As far as I know, yes, sir, to each state bank.

2913 Q. Each state bank; and that letter, through Exhibit 4, advised these banks that the Commission then estimated that there was net liabilities of the Guaranty Fund in excess of $6,000,000?

Mr. Sidner: Object as not proper redirect examination and the Exhibit speaking for itself.

The Court: Overruled.

Exception.

A. Yes, as the letter discloses there.

2914 Q. And that information as then communicated was

the information that was acquired by this bankers' committee appointed by the Governor several months earlier?

Mr. Sidner: Object as not proper redirect examination, incompetent, irrelevant and immaterial and repetition.

The Court: He may answer.

Exception.

A. Yes.

2915 Q. And in your cross examination, in referring to the knowledge as to the condition of the Guaranty Fund acquired in July and September of 1928, and later, to whom did you refer as acquiring the knowledge.

Mr. Sidner: Object to the question as unintelligible.

[fol. 671] Mr. Abbott: Strike the question.

2916 Q. Did you refer, in your answer on cross examination to the bankers or to the public?

Mr. Sidner. Object as being shown by newspaper advertising.

The Court: He may answer.

Exception.

A. I think I testified that the first general public article that I had occasion to read or saw was the one in July, I believe that was 1928.

2917 Q. Now, have the bankers at any time, to your knowledge, been denied any information with respect to the then status of the Guaranty Fund or its liabilities, on inquiry?

A. Not that I know of.

2918 Q. What particular branch of your Department, Mr. Bliss, has the particular administration of the assets and the keeping of the records on the status of the Guaranty Fund?

A. That is all handled in the Guaranty Fund Commission, if that would be considered a branch of our Department.

2919 Q. I called it a branch but I presume it wouldn't be called a branch, strictly speaking. Have you frequently had occasion during the years to refer inquirers to Mr. Peterson as to the status of the fund?

Mr. Sidner: Object as not proper re direct examination.
The Court: Sustain the objection.

Exception.

Mr. Abbott: That is all.

[fol. 672] Recross-examination.

By Mr. Sidner:

2920 Q. In answer to Mr. Abbott you again referred to the information you gave the bankers committee in 1927. Did you give them any further or additional information than is shown on the bottom of Exhibit 4?

Mr. Abbott: Object as gone over in their case in chief.
The Court: He may answer.

Exception.

A. Yes, I think the data that they had access to there and the memoranda that they had covered the banks then operating; they had access to the figures at that time.

2921 Q. Did they have access to the names of the banks or the amounts against the banks still operating?

A. They did, as I recall it, they had figures that represented the examiners' reports.

2922 Q. And the figures were taken off that report, either by you or someone in your office and the totals were summarized by you in this foot note on Exhibit 4, is that correct?

Mr. Abbott: Object as improperly reflecting Exhibit 4, in that Exhibit 4 shows that, above the footnote, shows a loss over *over* $6,000,000.
The Court: Overruled.

Exception.

A. Yes, after the committee was familiar with the figures.

2923 Q. But they were simply figures you had taken over and given to them?

A. They were the figures I had taken off, yes.

[fol. 673] 2924 Q. And they were figures you had summarized?

A. Yes.

2925 Q. And you made the additions and subtractions on your office?

A. I wouldn't say I made the additions. I took those figures, my office took those figures off the reports.

2926 Q. Mr. Corey prepared these total figures and the total figures were given by you to these bankers?

A. That might be true, I have forgotten who prepared them.

Mr. Sidner: That is all.

Cross examination.

By Mr. Hotz, for intervenors:

2927 Q. Would you please hand Mr. Bliss Exhibits 16 and 44? In Exhibit 44 you have made a compilation of all of the regular assessments as well as the special assessments that have been levied, since the operation of the Guaranty Fund Law and I observe this special assessment has only been levied in full for the past three and a half years, is that correct?

A. Yes, it appears to have been levied in full in 1925, 1926, 1927 and in 1928, the levy has been made.

2928 Q. And the collection made?

A. Not the full collection in 1928, but the levy has been made.

2929 Q. But I mean in the years 1925, 1926 and 1927, is that right?

A. Yes.

[fol. 674] 2930 Q. And in 1928 just one-half of it was paid?

A. Yes.

2931 Q. That was the June levy?

A. Yes.

2932 Q. But in each of those three years there was the full amount?

A. Yes.

2933 Q. I note in the years 1912, 1913, 1914 and 1915 there were no special assessments, is that right?

A. That is what the records disclose.

2934 Q. And in 1916 there was one-tenth of 1% levied as the special levy, is that what your records disclose?

A. Yes, sir.

2935 Q. Then there were no further special assessments in 1917 and 1918?

A. No, there were none.

2936 Q. Turn over here to Exhibit 16. When did the heavy bank failures start there, it was in 1921, was it not?

A. Yes, the first appreciable number in 1921.

2937 Q. And that was how many banks?

A. Twenty-five.

2938 Q. And the previous year there had been three or four?

A. Four.

2939 Q. And prior to that just one a year?

A. I don't have the figures, but it was just a small number.

2940 Q. Now, in 1921, the year in which the twenty-five banks failed, I noticed the assessment was eight-tenths per [fol. 675] cent and that therefore there was not a full assessment that year.

A. Yes, the records disclose that.

2941 Q. How many banks failed in 1922?

A. Twenty-one banks.

2942 Q. In 1922 you say there were twenty-one banks failed?

A. Yes.

2943 Q. And in that year the full special assessment was not levied?

A. No.

2944 Q. And in 1923, how many banks failed?

A. Twenty-four.

2945 Q. And the full assessment was not levied that year?

A. No.

2946 Q. And in 1924, what was it in 1924?

Mr. Gaines: Object as simply encumbering the record to repeat what the Exhibit shows.

The Court: He may answer.

Exception.

A. There was nineteen banks turned over to the Commission that year.

2947 Q. And that year the special assessment was three-tenths of a percent and that year the assessment changed

and was limited to five-tenths per cent, is that right, 1924?

A. Yes.

2948 Q. Now, Mr. Bliss, with the large number of failures in 1921, 1922, 1923 and 1924 what is your explanation as to why these assessments were not made in full?

Mr. Abbott: Object as Mr. Bliss was not secretary [fol. 676] then.

Mr. Hotz: Withdraw question.

2949 Q. On what basis are these special assessments made in your Department? How do you go about making the levy aside from the total average deposits of the banks?

A. They are regulated by the statutory provisions.

2950 Q. By the statutory provisions. And in reference to that, when the cash on hand drops below 1% do you then make a levy?

A. I think the statute reads something like that. The theory is that whenever the money on deposit in the Guaranty Fund, that is, the reserve or surplus amount gets below 1%, then you shall make a levy to bring it up. However, the statute provided in 1923 that you should not exceed one-half of one per cent in any one year so that in making a levy of one-half of one per cent it was impossible to bring it up to 1% as contemplated under the statute.

2951 Q. In other words, that made it impossible to bring it up according to the previous method of calculation?

A. I would take it that had something to do with it.

2952 Q. It didn't work out right mathematically, is that right?

A. No.

2953 Q. Now have you any knowledge based upon the records in your possession and control as to why these full assessments were not made in 1922, 1923, and 1924?

A. I wouldn't have any unless it was that the reserve or the surplus in the Guaranty Fund as carried in the banks were equal to one per cent.

[fol. 677] 2954 Q. Despite the fact the liabilities were far in excess of what the full assessment would bring in?

A. The liabilities, of course, of those banks just taken over that year were not determined, there had not been any drafts drawn on the Guaranty Fund for that money.

2955 Q. And that would continue on, would it, from year to year?

A. That would continue along until the liabilities of the failed banks developed and the court orders were issued to pay the loss.

2956 Q. When did that liability reach the point where you had to make the full assessment?

A. I can't testify for the Secretary in the office at that time but apparently in 1921 he came very near making the full assessment.

2957 Q. Well, he made it eight-tenths of one per cent and I submit if he had made it the full amount the cash on hand would have been $503,778.78. Now can you give us any explanation?

A. It would have been a difference of two-tenths per cent. Do you compute that at half a million dollars?

2958 Q. Yes. I also submit that in the year 1922 it would have been $436,805.64.

Mr. Gaines: Object to the form of the question, "I submit"; I move to strike the question.

The Court: Overruled.

Exception.

2959 Q. And that in 1923 the difference would be $771,848.37 and that in 1924 it would have been $503,733.68 or a total assessment of $2,216,169.47, from your Exhibit. [fol. 678] Now, can you give us any explanation, can you give us any light upon the reason for the failure to levy the assessment in those years in the face of the number of banks you stated failed?

Mr. Gaines: Object as incompetent, irrelevant and immaterial, not proper cross examination, witness has shown himself unqualified to testify.

The Court: He may answer.

Exception.

A. I can't give you any light other than the fund probably held the one per cent with no orders against it.

2960 Q. The Fund held the one per cent with the banks failing as in Exhibit 16. That was known to the Department of Trade and Commerce because when a bank failed it took charge and turned it over to the Guaranty Fund Commis-

sion. In connection with the thirty-nine million of assets now in the hands of the Guaranty Fund Commission and on which an estimate was placed on their present worth as ten million, you have nothing whatever to do with fixing that figure?

A. No, sir.

2961 Q. Now, Mr. Bliss, was Mr. Bryan Governor in 1923 when this Guaranty Fund Law was passed?

Mr. Gaines: Object as immaterial.

The Court: Overruled.

Exception.

A. I believe so.

2962 Q. Now, you mention the Guaranty Fund Commission. That is, of course, made up of representative bankers [fol. 679] appointed by the group of bankers in the community and they represent the Guaranty Fund. Now, was it that group, members of the Guaranty Fund Commission, that took an active part in their effort to reduce the interest rate from 5% to 4% in 1925?

Mr. Gaines: Object as not proper cross examination, incompetent, irrelevant and immaterial, assuming a fact not proven.

The Court: Overruled.

Exception.

A. It was the members of the Commission at the time, yes.

2963 Q. And they did that in order to reduce the overhead of the banks generally?

Mr. Gaines: Object as calling for the witness' conclusion as to what was in their minds.

Mr. Hotz: Withdraw the question.

2964 Q. Now, in examining you the other day in connection with Exhibit 19, I think it is, and you have been asked numerous questions in reference to that Exhibit, in reference to the refund. Now, that refund was a part of the assets that went to make up the figures as to whether or not the assessment should be a full assessment or not, isn't that true? I will add that was considered as part of the money on hand, isn't that right?

A. It would seem that from the way the statute reads on that point but whenever the Guaranty Fund has on hand one per cent you don't levy any special assessment but you levy the regular assessment anyway.

2965 Q. But it is the special assessment I have in mind, [fol. 680] Mr. Bliss. So that really that total refund to the Guaranty Fund reflects itself in the amount of the assessment, the amount of the special assessment against the banks?

A. It would have some reflection as to the amount the Secretary would levy, no doubt.

2966 Q. You, in your experience, while you have been the head of the Department of Trade and Commerce, have levied the full amount each year of your tenure of office?

A. Yes, during my time of administration the fund has always been so low that there was never any question, it had no reserve, we have always levied the full amount.

2967 Q. Now, where are the books in reference to the making of the levy in 1921, 1922, 1923 and 1924?

A. Where are the books? They would be on our office.

2968 Q. Would those be available, to ourselves for instance, as to how they arrived at the special assessment in those particular years?

A. I would think so, I don't know of any reason why you shouldn't have access to them.

2969 Q. And we may do so if we send someone there?

A. Yes.

Mr. Hotz: That is all.

[fol. 681] Mr. Clarence G. Bliss recalled for redirect examination by the defendants.

By Mr. Abbott:

2970 Q. Mr. Bliss, in the operation of the state banks and referring to semi-annual periods, say the first half of the year or the last half of the year, is there any fixed custom as to charging up expense, charging up interest or crediting interest, or do the banks vary in that regard as between the first or the last half of the year?

A. They might vary.

2971 Q. Then as between the semi-annual periods of the year the showing of a bank in each semi-annual period would be influenced by whether the bank made its charge ups and its credits in the first half or the last half of the year?

A. Yes, sure.

2972 Q. So, in order to get the true reflection of a bank for a period of twelve or eighteen months you would have to take a statement of the bank for the particular period rather than separate semi-annual statements?

A. Yes, the bank might not earn any money during the first six months and during the last half, when harvest came on and they collected interest they might show some earnings.

2973 Q. And in the matter of when they charge up expense, as to the first half or the last half, is there some dif-
[fol. 682-684A] ference?

A. The general custom is for the banks to charge expense monthly as bills come in, to pay them.

Mr. Abbott: That is all.

Recross-examination.

By Mr. Hotz:

2974 Q. Does your Department pay out any money in support of the Guaranty Fund Commission from the appropriation that comes to you or are they self-sustaining?

A. There is an appropriation made by the Legislature for the use of the Commission. The members of the Commission take care of their personal expenses and it is not aimed to take care of the expenses of the banks but to take care of the Commission as a bureau. It is an amount of $15,000 a year or $30,000 a biennium as made by the Legislature.

Mr. Hotz: That is all.

Witness excused.

[fol. 685] EXHIBIT No. 42 RECEIVED IN EVIDENCE

State of Nebraska

[SEAL.]

Guaranty Fund Certificate

Number —

Department of Trade and Commerce, Bureau of Banking, Lincoln, Nebraska

This is to Certify that the —— has complied with the requirements of the laws of the State of Nebraska for the protection of bank depositors, and its depositors are protected according to provisions of laws pertaining thereto, by the Depositors' Guaranty Fund.

In testimony whereof I hereto subscribe my name and affix the seal of my office, at Lincoln the day and year first above written.

—— ——, Governor.

Attest: —— ——, Secretary of the Department of Trade and Commerce.

State Journal Co., Lincoln.

[fol. 686] EXHIBIT No. 43 RECEIVED IN EVIDENCE

State of Nebraska

No. 58

Department [SEAL.] of Banking

This is to Certify, that the Elgin State Bank of Elgin, has complied with the laws of this State for the protection of Bank Depositors, and that its Depositors are Protected by the Depositors Guaranty Fund of the State of Nebraska.

In testimony whereof, the State Banking Board has caused this certificate to be executed and attested by its Chairman and Secretary under its official seal Done at the

City of Lincoln this First day of July in the year of our Lord, One Thousand, Nine Hundred and Eleven.

Chester H. Aldrich, Chairman of the State Banking Board.

Attest: S. E. Royse, Secretary of the State Banking Board. (Seal.)

State Journal Co., Lincoln, Neb.

[fol. 687] EXHIBIT NO. 44 RECEIVED IN EVIDENCE

Assessments Made

1911		
Regular Assessment		$176,863.36
1912		
Regular Assessment		406,858.07
1913		
Regular Assessment		271,806.68
1914		
Regular Assessment		140,647.34
1915		
Regular Assessment		144,684.92
1916		
Regular Assessment, 1/10 of 1%	$196,836.65	
Special Assessment, 1/10 of 1%	224,635.16	
		421,471.81
1917		
Regular Assessment		219,904.49
1918		
Regular Assessment		318,028.79
1919		
Regular Assessment, 1/10 of 1%	$290,868.39	
Special Assessment, 2/10 of 1%	511,608.35	
		802,476.74
1920		
Regular Assessment, 1/10 of 1%	$292,462.61	
Special Assessment, 2/10 of 1%	346,781.32	
		639,243.93
1921		
Regular Assessment, 1/10 of 1%	$302,692.58	
Special Assessment, 8/10 of 1%	2,015,115.12	
		2,317,807.70

[fol. 687a]

1922		
Regular Assessment, 1/10 of 1%	$228,345.36	
Special Assessment, 1/10 of 1%	1,743,234.56	
		1,971,579.92
1923		
Regular Assessment, 1/10 of 1%	$245,341.12	
Special Assessment, 7/10 of 1%	1,800,979.27	
		2,046,320.39
1924		
Regular Assessment, 1/10 of 1%	$249,259.49	
Special Assessment, 3/10 of 1%	755,600.52	
		1,004,860.01
1925		
Regular Assessment, 1/10 of 1%	$281,972.60	
Special Assessment, 5/10 of 1%	1,334,357.25	
		1,616,329.85
1926		
Regular Assessment, 1/10 of 1%	$290,244.16	
Special Assessment, 5/10 of 1%	1,382,094.59	
		1,672,338.75
1927		
Regular Assessment, 1/10 of 1%	$285,817.88	
Special Assessment, 5/10 of 1%	1,367,388.88	
		1,653,206.76
1928		
Regular Assessment, 1/10 of 1%	$263,937.03	
Special Assessment, 2½/10 of 1%	621,475.57	
		885,412.60
Total		16,709,842.11
Special Assessment, 2½/10 of 1% levied Dec. 15, 1928 (Not paid)		$622,947.76

[fols. 688-703] Exhibit No. 45 Received in Evidence

Resolution

Whereas, at a recent representative meeting of state bankers it was considered advisable and necessary to issue and sell a large amount of receiver's certificates for the use and benefit of the Guaranty Fund of Nebraska,

Now, therefore, be it resolved by the Board of Directors of —— Bank of —— that said bank, for the purpose of aiding the sale of said receiver's certificates, does hereby

pledge and agree that said bank above named will continue under the present system of banking and under a state charter until the close of the year 1930, paying the maximum rate of assessments of six-tenths (6/10) of one per cent (1%) per annum, into the Guaranty Fund, in accordance with the Nebraska statute.

And be it further resolved that this resolution be entered upon the minutes of said bank and a copy of same be furnished and sent to the Secretary of the Department of Trade and Commerce.

At a regular meeting of the Board of Directors of the above named bank the above resolution was unanimously adopted this — day of ——, 1927.

—— ——, Secretary of Board of Directors.

[fol. 704] Mr. Epes Corey, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Abbott:

3053 Q. Mr. Corey, what is your occupation?

A. Auditor of the banking department.

3054 Q. And how long have you been auditor of the banking department?

A. About two years and a half.

3055 Q. Prior to that time were you connected with the banking department of the state?

A. No, sir.

3056 Q. Calling your attention to Exhibit 39, being an analysis of the operating expenses and income of 845 Nebraska State Banks from July 1, 1925 to June 30, 1926, you may state if you know who prepared it, that analysis?

A. I compiled it.

3057 Q. And from what did you compile it, Mr. Corey?

A. Questionnaires submitted by all the different banks.

3058 Q. From individual questionnaires that had been answered by the banks of the state and forwarded to the banking department?

A. Yes, sir.

3059 Q. And about when was it you prepared that analysis?

A. Well, the latter part of August and it took me about a month.

3060 Q. August of what year?

[fol. 705] A. 1926.

3061 Q. And did you make the classifications and tabulations upon this Exhibit and the different columns of the Exhibit?

A. Yes, sir, all of them.

3062 Q. And is this analysis a correct analysis and reflection of the figures as contained on those report sheets as made by the banks?

A. To the best of my knowledge and belief they are.

3063 Q. And that computation of percentages, you made those computations, did you?

A. Yes, sir.

3064 Q. And from those figures?

A. Yes, sir, all of them.

Mr. Abbott: We offer in evidence this Exhibit No. 39.

It now being four thirty o'clock p. m. the Court took an adjournment to the following day, February 12th, 1929, at ten o'clock a. m.

[fol. 706] Tuesday, February 12, 1929, ten o'clock a. m., Court convened pursuant to adjournment and the following proceedings were had, to wit:

Mr. Epes Corey resumed the stand for further direct examination and testified as follows:

Mr. Gaines: Object as incompetent and immaterial.

The Court: Overruled.

Exception.

By Mr. Abbott:

3065 Q. Referring to the items on Exhibit No. 39, "Total Deposits" and "Average Deposits", were those items taken

from some report in your office other than the report of the banks?

A. It was taken from the reports from the banks of the average deposits for the six months ending June 30, 1926.

3066 Q. But that was a different report from the earnings' report that the other data was taken from, was it?

A. Yes, sir.

Mr. Abbott: We renew the offer.

Exhibit No. 39 received in evidence, is attached to and made a part of this Bill of Exceptions, appearing at Page 710 hereof.

Mr. Abbott: You may cross-examine.

Cross-examination.

By Mr. Gaines:

3067 Q. Exhibit 39 was prepared by you largely from the [fol. 707] answers to a form you sent out to various banks?

A. Yes, sir.

3068 Q. Is the paper that I hand you the form you sent to the banks?

A. Yes, sir.

3069 Q. There was no requirement on the part of the bankers that they should swear to the report?

A. No, sir, just as the heading states, is all.

4070 Q. Is Exhibit 48 the form?

A. Yes, sir.

3071 Q. Were they all alike?

A. Yes, sir.

Mr. Gaines: We offer in evidence Exhibit 48.

Mr. Abbott: No objection.

Exhibit No. 48 received in evidence, is attached to and made a part of this Bill of Exceptions, appearing at Page 711 hereof.

3072 Q. Do you know what items were included under the heading of expenses?

A. Not positively.

3073 Q. You did not require any details as to what were included in that item?

A. No, sir, just as all other profits were asked for they were supposed to put in all other expenses, those were the figures used in the compilation.

3074 Q. Did you make any computation to determine in any particular bank as to whether its expenses for that [fol. 708] period exceeded its earnings?

3075 Q. A. That was taken into consideration.

Mr. Gaines: Will you read the question, please.

Question read.

3076 Q. Is your answer the same?

A. Yes, sir.

3077 Q. Are you able to tell at this time the number of banks which made the report where their earnings did not exceed their expenses?

A. No, sir.

Mr. Abbott: Object as immaterial and——

The Court: The witness has already answered.

Mr. Abbott: Move to strike the answer.

The Court: Overruled.

Exception.

3078 Q. You didn't take into consideration banks that had a capital of more than $200,000.00?

A. No, sir.

3079 Q. There is only one such bank and no report was received from it?

A. No, sir.

3080 Q. Do you know the number of banks that reported?

A. No, sir.

3081 Q. Did all of them?

A. 845.

3082 Q. What was the total number of banks?

A. 893.

3083 Q. Do you know why the other fifty did not report?

A. 38 were Guaranty Fund banks, and ten didnt' report.

[fol. 709] 3084 Q. You mean were in the hands of the Guaranty Fund Commission?

A. Yes.

Redirect examination.

By Mr. Abbott:

3085 Q. This one bank that wasn't included, that had capital in excess of the classification here; why was that not included?

A. Because that was the only one with $500,000.00 capital and everyone would know that Mr. Gaines had a going bank.

3096 Q. You mean Mr. Schantz?

A. No, I mean Mr. Gaines.

3087 Q. Then the one bank you refer to is the State Bank of Omaha?

A. Yes, sir.

3088 Q. I see; that is all, Mr. Corey.

Witness excused.

EXHIBIT No. 39 RECEIVED IN EVIDENCE

Analysis of Operating Expenses and Income of 845 Nebraska State Banks from July 1, 1925, to June 30, 1926

Capital	10,000 to 20,000 206 banks	20,000 to 40,000 426 banks	40,000 to 75,000 177 banks	75,000 to 100,000 18 banks	100,000 to 200,000 18 banks	845 banks
Interest on Deposits and Savings	$800,024	$3,295,204	$2,583,324	$348,366	$598,033	$7,624,951
Interest on Borrowed Money	30,254	115,483	92,060	11,196	7,132	256,125
Guarantee Fund Assessments	106,129	636,258	486,573	63,844	142,813	1,435,608*
Salaries and Wages	496,880	1,721,821	1,267,654	155,450	294,061	3,935,876
Other Expenses	392,321	1,377,074	1,069,137	142,491	232,070	3,153,093
Total Expenses	$1,825,609	$7,145,840	$5,498,748	$721,347	$1,274,109	$16,465,653
Total Income	$1,965,140	$7,735,871	$6,082,979	$807,239	$1,539,315	$18,130,544
Net Income	139,531	590,031	548,231	85,892	265,206	1,664,891
Total Deposits	27,131,711	111,344,441	86,517,906	12,219,191	22,710,445	259,923,784
Average Deposits	131,773	261,372	488,802	678,844	1,261,691	307,602
Average Capital Per Bank	15,157	27,983	52,484	80,021	128,639	33,250
Net Profit on Capital and Surplus	4.47%	4.05%	6.28%	5.90%	11.45%	5.92%
Average Income Per Bank	9,539	18,159	34,367	44,846	85,517	21,456
Average Expense Per Bank	8,862	16,774	31,066	40,075	70,784	19,486
Average Net Profit Per Bank	$677	$1,385	$3,301	$4,771	$14,733	$1,970
Distribution of $1.00 of Expense						
Interest on Deposits and Savings	43.82c	46.11c	46.98c	48.30c	46.94c	46.31c
Interest on Borrowed Money	1.66c	1.61c	1.67c	1.55c	0.56c	1.56c

Guarantee Fund Assessments	9.09c	8.90c	8.85c	8.85c	11.21c	9.08c
Salaries and Wages	27.22c	24.10c	23.06c	21.55c	23.08c	23.90c
Other Expenses	18.21c	19.28c	19.44c	19.75c	18.21c	19.15c
	100.00c	100.00c	100.00c	100.00c	100.00c	100.00c
Expense (per cent of deposits)						
Interest on Deposits and Savings	2.947%	2.959%	2.983%	2.850%	2.633%	2.931%
Interest on Borrowed Money	.111%	.163%	.106%	.001%	.632%	.090%
Guarantee Fund Assessments	.611%	.571%	.562%	.522%	.630%	.575%*
Salaries and Wages	1.831%	1.547%	1.464%	1.271%	1.294%	1.514%
Other Expenses	1.225%	1.237%	1.235%	1.170%	1.021%	1.212%
Average Per Cent of Expense on Deposits	6.725%	6.417%	6.350%	5.904%	5.610%	6.330%
Average Per Cent of Income on Deposits	7.23 %	6.947%	7.03 %	6.614%	6.777%	6.97 %
Average Per Cent Net Profit on Deposits	.51 %	.53 %	.68 %	.71 %	1.167%	.64 %

(Thirty-eight Guaranty Fund Commission Banks and ten delayed reports not included. 893 State Banks in Nebraska June 30, 1926.

*Total assessments levied during period aggregate six-tenths of one per cent. Deficiency arises because of different dates assessments were entered.

Compiled by Department of Trade and Commerce, Lincoln, Nebraska.

[fols. 711-715] EXHIBIT NO. 48 RECEIVED IN EVIDENCE

Department of Trade and Commerce

Kirk Griggs, Secretary

Bureau of Banking, Bureau of Insurance, Bureau of Securities, Bureau of Fire Prevention

[SEAL.]

State of Nebraska, Adam McMullen, Governor, Lincoln

GENTLEMEN: For statistical purposes, will you kindly fill out and return to us without delay, division of your expenses and earnings during the year July 1, 1925 to June 30, 1926, as follows:

Expenses		Earnings	
Interest paid on deposits including saving accounts	$	Interest received	$
Interest paid on borrowed money		Exchange and commission	
Guarantee fund assessments		All other profits	
Salaries and Wages			
All other expenses			
Capital Stock, $			
Surplus			

Department of Trade and Commerce. —— ——, Secretary.

[fol. 716] Mr. M. L. SPRINGER, called as a witness on behalf of the defendants, after being duly sworn, testified as follows:

By Mr. Abbott:

3105 Q. Mr. Springer, you reside in Lincoln?

A. Yes, sir.

3106 Q. What is your position?

A. I am engaged at the Commerce Trust Company, Secretary and Treasurer.

3107 Q. What particular department do you work in there?

A. I have charge of all the departments, including bonds, mortgages, real estate and insurance.

3108 Q. You have charge of the insurance department?

A. Yes, sir.

3109 Q. And in that department you have charge of the [fol. 717] issuing of depository bonds?

A. We write them for the companies.

3110 Q. How long have you been engaged in that business?

A. Since January 1, 1924.

3111 Q. Are you acquainted with and do you have knowledge of the rates in force in the State of Nebraska and charged for depository bonds of banks to secure deposits in the banks of public funds and otherwise?

A. Yes, sir.

3112 Q. Are those rates uniform all over the state?

A. Yes, sir.

3113 Q. Do you have the rate sheet from which you get your information?

A. I do.

3114 Q. And you are writing those bonds from time to time in your department?

A. We have had occasion to throughout the last five years.

3115 Q. And can you tell me the rate on depository bonds for deposits of public funds from January, 1924 to,—say January, 1929?

A. Yes, sir.

3116 Q. State banks, that would be?

A. Yes, sir.

3117 Q. They apply to state banks?

A. Yes, sir.

3118 Q. Now you may tell the court what those rates are or were from January, 1924, to January, 1929.

[fol. 718] Mr. Flansburg: Object as immaterial.

The Court: He may answer.

Exception.

A. The rates since September 1, 1924, have been as follows: Upon banks of a capital of less than $50,000,

$10.00 per thousand; on banks of a capital of $50,000 and less than $100,000, $7.50 per thousand; on banks of $100,000 capital and less than $200,000, $6.00 per thousand; on banks of $200,000 capital and over, $5.00 per thousand.

3119 Q. The rates you have given have been the same from January, 1924, to the first of January, 1929?

A. Those rates became effective September 1, 1924.

Mr. Abbott: That is all.

Cross-examination.

By Mr. Gaines:

3120 Q. Are the rates on National banks and state banks the same?

A. Exactly.

3121 Q. Are they now?

A. Yes, sir.

By Mr. Hotz, for intervenors:

3122 Q. Do you write some of the bonds personally so that you know who pays the premium?

A. We have written quite a number during the period.

3123 Q. Who pays the premium?

A. The banks, so as I know. If there has been any other arrangement it hasn't come to our attention.

[fol. 719] 3124 Q. Are you speaking of bonds on public moneys?

A. Most of the bonds we have written have been for public moneys.

3125 Q. And those bonds are not paid by the state or county?

A. We have always billed them direct to the banks and the payments have come from the banks, where we have written them.

By Mr. Gaines:

3126 Q. Can you state whether there was a large amount of public moneys deposited in national banks during the period?

A. Why, not so very large because the moneys have been placed for some time.

3127 Q. That is, you wouldn't have the writing of them?

A. Well, we came into the business in 1924 and the national banks have been compelled to give bond right along.

3128 Q. So that they went to the other insurance companies to get them?

A. Yes, sir.

3129 Q. You are giving the rates of your company?

A. These rates are put out by a company which I believe is the Court Towner Rating Bureau and I know these rates are adopted by the United States Fidelity and Guaranty Company and the American Surety Company of New York.

Mr. Gaines: That is all.

By Mr. Ferneau:

3130 Q. As far as you know the rate is the same all over the state?

A. It is the same and applies to all the states with the [fol. 720] exception of California.

3131 Q. And all bonds have the same premium in all those states?

A. Yes, sir, I think so.

By Mr. Flansburg:

3132 Q. Mr. Springer, do you know whether these bonding companies will write bonds for banks which have a capital of $20,000 or under?

A. I understand the Fidelity and Deposit Company of Maryland now refuse to consider the application of a state bank having a capital under $20,000. I have no knowledge of other companies.

By Mr. Ferneau:

3133 Q. Do the other companies other than the one you mention?

A. If I may qualify my answer, they have refused to write for certain banks and I request the privilege not to state the names of those banks.

3134 Q. When did that company refuse to write the banks?

A. Well, I know of two instances in January of this year.

3135 Q. But do you know if they ever did it before January of this year?

A. Well, that wouldn't apply because national banks are capitalized at $25,000 and state banks were not being required to give bonds.

Witness excused.

[fol. 721] Mr. Sorenson: Defendants offer in evidence Exhibit 49.

Mr. Gaines: Object as immaterial.

The Court: Objection overruled.

Exception.

Exhibit No. 49 received in evidence, is attached to and made a part of this Bill of Exceptions, appearing at page 724 hereof.

Mr. Clarence G. Bliss resumed the stand for further redirect examination and testified as follows:

By Mr. Abbott:

3136 Q. Did you get for counsel the two banks that converted from national into state banks?

A. Yes, sir.

3137 Q. Will you produce them here now?

A. Yes, sir.

3138 Q. Were either of them the First National Bank of Dodge?

A. No, sir. (Witness produces list.)

3139 Q. Mr. Bliss, calling your attention to Exhibit No. 34 produced here by Mr. Peterson, it being a list of the banks whose depositors will participate in this dividend if paid, including the receivers' certificates, do you recognize those banks as receivership banks?

A. Yes.

3140 Q. And referring to those banks and the other receivership banks whose adjudicated liabilities aggregate in the neighborhood of ten million dollars are court orders on [fol. 722] file in your office and were they on file in your office, with the date it is paid out of the Guaranty Fund, prior to the institution of this suit?

A. Yes, sir.

3141 Q. And those have been filed from time to time as made by the various district courts?

A. Yes, sir.

3142 Q. You are custodian of them?

A. Yes, sir.

3143 Q. Mr. Bliss, on yesterday I asked you to furnish a copy of the notice sent out for the regular assessment of July 1, 1928 upon which you thought there was some information with reference to the status of the Fund. Have you that with you?

A. No, I find that the regular assessments did not have any letter go out in connection with them other than the assessment blank on which the assessment was computed. They just figured the one-twentieth of one per cent and credited it to our account and there was no separate letter.

3144 Q. So it carried no information other than the amount of the assessment?

A. No.

Mr. Abbott: We offer in evidence Exhibit 23 as it has been heretofore identified as a list of the banks in the hands of the commission and which Exhibit wasn't offered. Just a minute, we withdraw tender of Exhibit 23.

(Vols. 723-724 ff.) Cross-examination.

By Mr. Campbell, for intervenors:

3145 Q. Can you give us the exact total of adjudicated claims as of December 23, 1928?

A. December 23, 1928?

3146 Q. I believe that was the date the suit was filed. If you haven't that can you get it?

A. I can get you the claims as filed by the different court orders, as filed with our office, that were unpaid at that time.

3147 Q. And give us the exact amount?

A. Yes, sir.

Mr. Campbell: It is understood he is to give that amount to the reporter.

Mr. Bliss: That would be the claims on file in our department, showing the total liabilities to December 23, 1928?

The Court: It is understood Mr. Bliss may get these figures and furnish to the stenographer as his answer to the question.

Witness excused.

[fol. 725] Mr. Dan V. Stephens, recalled by the defendants for further direct examination, testified as follows:

By Mr. Ferneau:

3148 Q. Mr. Stephens, handing you Exhibit No. 50, particularly calling attention to the Bank Guaranty Law and a new method of procedure, I will ask you if that was prepared by you?

A. Yes, sir.

3149 Q. And did you cause it to be published in the paper?

A. Yes, sir.

3150 Q. In what paper?

A. In the Fremont Tribune.

3151 Q. And did you cause, was it circulated in any other way?

A. Not by me.

3152 Q. Not by you?

A. No, sir.

3153 Q. It was reprinted from the paper and sent out through the mail?

A. I think it was, that is my impression although I did not do it myself.

3154 Q. Now that is not an answer to the letter that appears in there?

A. Yes, sir, that was an explanation of the new method of procedure of the Guaranty Fund Commission.

3155 Q. How many times did you run it in the paper?

A. We only ran it once, at least that is my recollection of it. If we ran it more I have forgotten.

[fols. 726 & 727] 3156 Q. Is that a page of the Fremont Daily Tribune?

A. Not quite, it lacks one column of being a page.

3157 Q. The Exhibit is a page, except as to one column?

A. Yes, sir.

3158 Q. And the article that we have identified as Exhibit #50 contains the whole of one page except the one column?

A. Yes, sir.

Mr. Ferneau: We offer in evidence Exhibit #50.

Mr. Gaines: Object to the offer as immaterial and incompetent.

The Court: Overruled.

Exception.

Exhibit No. 50 received in evidence, read to the Court by Mr. Ferneau, is attached to this Bill of Exceptions, appearing at page 727 hereof.

Mr. Ferneau: That is all right now, Mr. Stephens.

Witness excused.

Mr. Abbott: Defendants rest.

[fol. 728] REBUTTAL

Mr. DAN V. STEPHENS, recalled by the plaintiffs, testified as follows:

Direct examination.

By Mr. Sidner:

3159 Q. Mr. Stephens, how long have you been in the banking business?

A. Since 1920.

3160 Q. What banking position do you occupy?

A. President of the Fremont State Bank.

3161 Q. What position do you hold with the First Nebraska Regional Clearing House Association?

A. President.

3162 Q. What is that?

A. That was an organization of bankers in the five counties surrounding Fremont designed to improve banking practices, prevent losses and stabilize the banking situation.

3163 Q. And how many banks are included in that Clearing House Association?

A. Approximately seventy.

3164 Q. In your bank at Fremont do you have occasion to do business with other state banks in eastern Nebraska?

A. Yes, sir.

3165 Q. Do you hold any official position in the national organization of the bankers association?

A. Yes, sir.

3166 Q. What position?

A. I am vice president of the state bankers division of [fol. 729] American Bankers Association.

3167 Q. Were you ever a member of the Guaranty Fund Commission.

A. No, sir.

3168 Q. And were you ever president of the State Bankers Association?

A. No, sir.

3169 Q. In your business as a banker what have you done to inform yourself as to the banking conditions and the banking situation in Nebraska?

A. Well, I have been in constant touch with the general situation, not in a technical way but in an administrative way. I have been familiar with the conditions generally in the state. I have participated in many bank conferences designed to improve the conditions, called for improving the conditions and in a general way participated in the banking business of the state.

3170 Q. Have you attended different group meetings of bankers throughout the state?

A. Sometimes.

3171 Q. And the state conventions of the State Bankers Association?

A. Always.

3172 Q. With reference to the publications, the reports and the data published by the different bank publications, have you read and studied those?

A. Yes, sir, in a general way I am familiar with them.

3173 Q. Do you get and do you study the reports of the different banks throughout the country?

A. Yes, sir.

3174 Q. In this study and investigation have you in- [fol. 730] formed yourself and do you know what is the reasonable, necessary charge outs of banks for losses per annum?

Mr. Abbott: Objected to as irrelevant, incompetent and immaterial, no proper foundation laid and not proper rebuttal.

The Court: He may answer.

Exception.

3175 Q. Do you know?

A. Yes, sir, in a general way I am familiar with that.

3176 Q. You may state what that would be per annum?

Mr. Abbott: Objected to as irrelevant, incompetent and immaterial, no proper foundation laid and not proper rebuttal.

The Court: He may answer.

Exception.

A. In my own bank?

3177 Q. Give it generally.

A. I would estimate the losses, generally, from bad loans approximately 1.25% to 1.5% in the average bank in Nebraska.

3178 Q. Percentage on what?

A. On deposits.

3179 Q. And what would that be if based on gross earnings?

Mr. Abbott: Object as incompetent, irrelevant and immaterial, not proper rebuttal and no sufficient foundation laid.

The Court: Overruled.

Exception.

A. I haven't made that calculation.

3180 Q. I see. Do you know generally what comprises the tenth Federal Reserve District?

[fol. 731] A. Yes, sir.

3181 Q. Is that the District in which Nebraska is located?

A. Yes, sir.

3182 Q. Do you have access to the official reports put out by the Department at Washington?

A. Yes, sir, I get them every month.

3183 Q. Relating to banking conditions?

A. Yes, sir.

[184 Q. And you get other technical publications with reference to the conditions of banks in this district?

A. Yes, sir.

[185 Q. Do the official reports put out from Washington show the amount of the average charge outs?

A. Yes, sir.

[186 Q. Of all the national banks in the tenth Federal Reserve District for the year 1927?

A. Yes, sir.

[187 Q. From that official record do you know what the average charge outs were in the tenth Federal Reserve District, including the State of Nebraska?

Mr. Wilson: I object to the question, immaterial, incompetent and the best evidence and not proper rebuttal.

The Court: Overruled.

Exception.

[188 Q. Do you have before you that report?

A. Yes, sir. The Federal Reserve Report.

[189 Q. The official bank report issued by the Federal Reserve Bureau at Washington?

A. Yes, sir.

[190 Q. Now you may state what that is that is the charge outs.

Mr. Wilson: I object to the question, immaterial, incompetent, not the best evidence and not proper rebuttal.

The Court: Overruled.

Exception.

A. The law requires that every [illegible] amount [illegible]

[191 Q. That is on each $100 of invested capital?

A. Yes. You go ahead and [illegible] that means the regular rate the bank makes and the money it has invested in bond and other securities that produce a revenue for the bank. [illegible] capital and as cash on hands in banks not necessarily earning any money.

[192 Q. What part of those amounts are usually included in working capital, loans and investments?

A. About 15% reserve is required by law in the state of Nebraska and 7% in national banks.

3197 Q. So that in national banks their deposits would have or would be 7% or more than the amount invested in notes and bonds?

A. Yes, sir.

3198 Q. Mr. Abbott: Move to strike question and answer as unintelligible.

The Court: Motion overruled.

Exception.

3199 Q. What state comprises the Tenth Federal Reserve District, Mr. Stephens? You can give some, possibly not all of them?

A. Kansas, Nebraska, Wyoming, part of Colorado. I am not sure whether any of South Dakota is included or not.

3200 Q. Western Missouri?

A. Yes, sir.

3201 Q. Oklahoma?

A. Yes, sir.

3202 Q. Mr. Stephens, some testimony has been introduced here with reference to the Fremont State Bank. What was the condition of the Fremont State Bank in [illegible] when you took it over?

A. It was in a very bad condition.

3203 Q. Did it take all that time and paper from the examiner's point?

A. No, sir, it took a few small items among the [illegible] of the examiners.

3204 Q. Have you the rate of charge-offs that you have taken [illegible] in the Fremont State Bank from the time you took it over until the present time?

A. Yes, sir.

3205 Q. What percentage of your investments have been [illegible]?

Mr. Abbott: Object as immaterial and not proper to [illegible].

The Court: He may answer.

Exception.

A. We carry usually from fifty to sixty per cent in bonds and securities of that kind.

3202 Q. Is the loss on that kind of securities much less than on loans and discounts?

A. Much less. We have had no loss except some shrink-
[fol. 734] age in values now and then due to the fluctuation of the market.

3203 Q. Mr. Stephens, you have been active in state banking affairs in the state, have you?

A. Yes, sir.

3204 Q. What have you done in the way of assisting the state administration in the handling of the Guaranty Fund?

A. I have done everything I possibly could do in co-operating with them, public speaking for them and backing up their recommendations.

3205 Q. When did that begin?

A. When our trouble began early in 1921.

3206 Q. What happened then?

A. Almost a complete debacle in the way of business failures, bank failures and individual failures throughout the state.

3207 Q. What, if anything, did the state bankers of the state do at that time to assist the State Department in handling the situation?

Mr. Abbott: Object as incompetent and immaterial.

No ruling.

3208 Q. What did you and other bankers in connection with you do at that time?

Mr. Abbott: Object as not proper rebuttal and incompetent and immaterial.

The Court: Overruled.

Exception.

A. Upon the representations made to us by the Banking Department at Lincoln we assembled a group of bankers in
[fol. 735] Omaha for the purpose of forming the Agricultural Loan Association to support the Guaranty Fund which at that time was inadequate to pay the very excessive losses that had been thrown upon it as a result of a very large number of bank failures. This Association was ex-

clusively capitalized by the State Bankers of Nebraska to the number of nine hundred or more who were able through this organization to buy the receiver's certificates which were issued by the courts to pay the losses to depositors in the banks that had failed and for which there were no funds available in the Guaranty Fund. We rediscounted, during that period of 1921 and 1922 approximately two and a half million dollars worth of receiver's certificates, the proceeds of which went to pay depositors in failed banks. This was a voluntary act upon the part of the bankers who participated in it.

3209 Q. At that time were you informed by the Banking Department that that would be sufficient to tide them over?

Mr. Abbott: Objected to as leading and not proper rebuttal.

No ruling.

3210 Q. At that time were you in conferences with the Banking Department of the State of Nebraska?

A. Yes, sir.

3211 Q. What information, if any, did they give you and the other bankers at that time?

Mr. Abbott: Objected to as not proper rebuttal, incompetent, immaterial, hearsay and referring to a past date [fol. 736] that could have no bearing on this case.

The Court: Overruled.

Exception.

A. In a general way we were informed that our action would save the situation and the Guaranty Fund from collapse and it did do that, temporarily.

3212 Q. What transpired in 1923 in connection with the banking situation?

A. Our voluntary action in connection with the organization of this Association, of course, was rather irregular and not authorized directly by the banking statute.

Mr. Abbott: Move to strike all this out as not responsive and argumentative.

The Court: Overruled.

Exception.

A. (Continued:) So, in order that we could do legally, through machinery set up by law, the things we had done through the Agricultural Loan Association, that resulted in the formation of the Guaranty Fund legislation, the enactment of the Guaranty Fund Commission Act.

3213 Q. This Act permitted the issuing of receiver's certificates?

Mr. Abbott: Objected to as the Act speaks for itself, incompetent and immaterial.

The Court: Overruled.

Exception.

A. This enabled the Commission to issue receiver's certificates and market them in a legal way if they could find purchasers for them, thus spreading the loss over a longer period of time, enabling the assessments to catch up with the losses.

3214 Q. Now, Mr. Stephens, in the year 1925, in October, [fol. 737] who was Secretary of the Department of Trade and Commerce of Nebraska, at that time?

A. Mr. Kirk Griggs.

3215 Q. Were you present at a meeting of bankers at which he made an address?

A. Yes, sir, many of them.

3216 Q. And in which he was presenting to the bankers the situation with respect to his Department and the banks?

A. Yes, sir.

3217 Q. In those addresses did he purport to give to the bankers information with respect to the Fund and the probable losses?

A. Yes, sir.

3218 Q. You may state what information he gave to the bankers in those addresses at that time?

Mr. Abbott: Object as not proper rebuttal, calling for hearsay testimony and not the best evidence. Mr. Griggs is—I would like to make inquiry of Mr. Stephens at this time.

The Court: You may.

By Mr. Abbott:

3219 Q. Mr. Griggs is at this time located where, if you know, Mr. Stephens?

A. In Lincoln.

3220 Q. I mean Mr. Griggs.

A. In Omaha.

3221 Q. A resident of Omaha and Douglas County?

A. Yes, sir.

[fol. 738] Mr. Abbott: We renew the objection and suggest Mr. Griggs is not within the jurisdiction of the court and the question is not only subject to the objection made but we would be unable to rebut it as Mr. Griggs is not in the jurisdiction of this court.

Mr. Campbell: Intervenors object as immaterial and for the further reason that it is not binding upon them.

The Court: Both objections overruled.

Exception.

A. I recall distinctly that Mr. Griggs spoke in Omaha on October 22, 1925 — (interrupted)

Mr. Abbott: Object to anything Mr. Griggs said in Omaha in 1925 as not in the line of his official duties and as incompetent, immaterial and hearsay.

The Court: Overruled.

Exception.

A. (Continuing:) — in which he stated that the losses in the banks of the state would be cleared up within two years and that the amount would be approximately two or three million dollars.

3222 Q. That speech was made to the bankers in convention assembled?

A. Yes, sir.

3223 Q. That was the state bankers?

A. The Nebraska State Bankers Association.

3224 Q. Mr. Stephens, at that time did you or any other banker, to your knowledge, have any way of knowing [fol. 739] whether that statement was true or not?

Mr. Abbott: Object to the question so far as it includes other bankers for the reason that manifestly this witness could not speak for the other bankers or their source of information and it is incompetent and immaterial.

The Court: Overruled.

Exception.

would not come next. The bankers, having been assured that we were past the crisis in Nebraska——(interrupted)

[fol. 742] Mr. Abbott: We object and think witness ought to keep his answers to statements of facts and not conclusions and opinions. Object to this line of answers on that basis.

The Court: Answer and confine it as much as you can to giving facts.

Exception.

A. I thought I was recording facts, that was my purpose in making the statement that I did. I knew the conditions and the statement I have just made is a fact.

Mr. Abbott: We move to strike that answer out as argumentative and not responsive. Move to strike out that part "bankers having been assured" as not responsive.

The Court: Sustained.

Exception.

A. The situation seemed to justify——(interrupted)

Mr. Abbott: Object to this as purely conclusion and argumentative.

Mr. Sidner: I will withdraw the question and put it a little differently.

3237 Q. Mr. Stephens, you may give the circumstances, the reasons and purpose in the advertising campaign?

Mr. Abbott: Objected to as not proper rebuttal, calling for conclusion of the witness and not for facts, incompetent and immaterial in any event as to the reason that prompted it.

The Court: Overruled.

Exception.

A. The circumstances were as previously disclosed. The purposes of the advertising campaign was to meet those [fol. 743] conditions by stabilizing, by crystallizing public opinion as to the general conditions existing in Nebraska as we understood them at that time; we believed that they ——(interrupted)

Mr. Abbott: We object to the witness stating "he believed" as incompetent and immaterial.

The Court: Overruled.

Exception.

A. (continued). We believed that the people would be misled by the reports coming out of South Dakota and inasmuch as the best information we had from the banking department convinced us that the Nebraksa situation was sound and that all we needed to do was to have faith, this led us to join in approving the program of the state wide advertisements that were inspired by the Omaha Bee and approved by the State Banking Department.

3238 Q. At that time had you had any information from the Banking Department other than that which you received in 1925 from the Secretary of the Department of Trade and Commerce as to the condition of the Fund?

Mr. Abbott: Objected to as not proper rebuttal, and incompetent and immaterial.

The Court: Overruled.

Exception.

A. No, sir, we had not. We believed the loss would be covered by the payment of two or three years' assessments at the most.

3239 Q. Is that what he told you?

Mr. Abbott: Objected to as hearsay and not proper rebuttal.

[fol. 744] The Court: Overruled.

Exception.

A. On February 22nd at Fremont Mr. Kirk Griggs, Secretary of the Department of Trade and Commerce, spoke before the bankers and in that speech he stated that the net loss would be approximate- three million dollars.

Mr. Abbott: Move to strike the answer out until I can interpose an objection. I object and move to strike the answer for the reason that the answer, so far as it quotes Mr. Griggs, is hearsay and incompetent and immaterial.

The Court: Motion overruled.

Exception.

3240 Q. Refreshing your recollection, in regard to that date, was it not Arbor day, April 22nd?

By Mr. Hotz:

3241 Q. Of what year?
A. 1925.

By Mr. Sidner:

3242 Q. Was that the date of the annual meeting of the bankers of that group?
A. Yes, sir.
3243 Q. And was that speech made to them in session at that time?
A. Yes, made to them at that time and repeated in the fall, October 22nd, in the state meeting in Omaha.
3244 Q. Mr. Stephens, were you a member of what has been referred to here as the Governor's committee in May, 1927?
A. No, sir, I refused to accept an appointment on that Committee.
3245 Q. Reverting to that advertising campaign, Mr. Stephens, you may give the history of that advertising, [fol. 745] how it was brought about, etc.: all of those details.

A. Mr. Abbott: Object as having been heretofore gone over again and again.
The Court: Overruled.

Exception.

A. It was apparently formed, the program was mapped out before I was ever consulted, by Mr. Leo Wilson and the Banking Department. I think after the program was made up they came to Fremont to consult me about it and get my approval.
3246 Q. Who came to you?
A. Mr. Leo Wilson. And I approved of it because conditions seemed to justify it and in a short time they called a meeting at Fremont, as a matter of convenience to myself rather than at Lincoln, and there the advertisements that

were prepared by the Omaha Bee in conjunction with the Banking Department were submitted for the approval of a group of ten or fifteen bankers who were assembled to see what was the nature of the advertisements that were to be published.

3247 Q. Who submitted the advertising?

A. They were presented to us by the editor of the Omaha Bee, Mr. Ballard Dunn, and his assistant, Mr. Leo Wilson, and they were accompanied by Mr. Griggs of the Banking Department.

3248 Q. That is, he accompanied them to Fremont?

A. That is, they were in attendance at the meeting.

3249 Q. Were the advertisements drawn at that time?

A. Yes, they were all drawn and some of the art work was submitted also.

[fol. 746] 3250 Q. Do you know whether the information contained in those advertisements was gone over by Kirk Griggs at that time?

A. Yes, sir, it was gone over by him. He sat with us in the conference and each line and paragraph of the advertisements was read, examined and approved.

3251 Q. Had you ever seen any of that material before that day?

A. No, I had nothing to do with preparing it.

3252 Q. Until Mr. Griggs and the editor of the Bee presented it to you there?

A. No, sir.

3253 Q. Did Mr. Griggs make any statement there, at that time, with reference to whether these advertisements should be published or not?

Mr. Abbott: Object as immaterial, not proper rebuttal and calling for conclusion and hearsay testimony.

The Court: Overruled.

Exception.

A. Yes, sir, he joined in with us in discussing the advertisements and we were unanimous in our approval of them, as I recall now.

3254 Q. What did he say about them, if you remember?

A. Yes, sir.

3261 Q. Who were the parties that went out over the state?

[fol. 748] A. The Secretary of the Department of Trade and Commerce and Mr. Peterson of the Guaranty Fund Commission.

3267 Q. That was Mr. Bliss, the Secretary of the Depart-
ment of Trade and Commerce?

A. Yes, sir, that was Mr. Bliss.

3268 Q. Did you hear them make addresses?

A. Yes, sir, I did at Fremont and also I heard them
[illegible] of that was later at Lincoln at a meeting called
[illegible] the Banking Department.

3269 Q. When was that meeting called?

A. I was notified, I think, in the fall of 1927 following
[illegible] those meetings, although I don't recall the ex-
act date.

3270 Q. Did Secretary Bliss of the Department of Trade
and Commerce and Secretary Van Peterson of the Guaranty
Fund [illegible] make any statements in the fall of 1927
[illegible] of the Guaranty Fund?

A. Yes, sir.

3271 Q. Were these addresses made to groups of bankers?

A. Yes, sir.

3272 Q. Were [illegible] together for the purpose of hearing that
report?

A. Yes, sir.

3273 Q. What did they say at that time with reference
to the condition of the Fund?

A. The losses at that time were indicated at a total of
about seven million dollars, six million I think in banks
already in the hands of the Commission and $1,118,000 in
banks that it was thought would have to be taken over very
shortly.

3274 Q. Was that the first time, when these men
presented it, that you had heard the loss would go up to
that amount?

A. Yes, sir. I had thought previously that three or four
million or something like that would probably be the out-
side.

3275 Q. And in the meanwhile you had paid in two years'
assessments, had you not?

Mr. Abbott: Objected to as immaterial and already hav-
ing been testified to.

The Court: Overruled.

Exception.

A. Yes, sir.

3271 Q. As a part of their presentation of this condition to the bankers what, if anything, did they ask of the bankers at that time?

Mr. Abbott: Objected to as not proper rebuttal and immaterial.

The Court: Overruled.

Exception.

A. They were attempting to induce the bankers of the state to underwrite approximately seven million dollars of assessments in advance of their due date in order that the depositors in failed banks might be immediately paid and the slate cleaned so that we could start out with all of our failures behind us.

3272 Q. Did they make any statement at that time in that connection as to whether or not this seven millions would clean up all past and future liabilities?

A. Yes, sir, that was their claim at that time and the as- [fol. 750] surance they gave us and we came very nearly underwriting the loss upon that assurance.

3273 Q. Coming down now to the summer of 1928, did you get any further information with reference to the condition of the Fund?

A. Not officially from the Department but we did have announcements publicly made through the press by the attorney for the Guaranty Fund Commission stating that the loss would probably be ten million dollars, approximately, instead of seven; and other rumors to that effect kept floating in upon us.

3274 Q. Now, later, and in September, did you come to Lincoln for the purpose of finding out about the situation?

A. Yes, sir, we did.

3275 Q. And to whom did you go?

A. We went to Secretary Bliss.

3276 Q. That would be in September of 1928?

A. Yes, sir.

3277 Q. And did you call upon Van Peterson at that time, the Secretary of the Guaranty Fund Commission?

A. Yes, sir.

3278 Q. Now, did you have any conversation with Mr. Bliss at that time?

A. Yes, we did.

3279 Q. What did he say at that time about the condition of the Fund?

Mr. Campbell: Intervenors object as not binding upon them.

The Court: Overruled.

Exception.

[fol. 751] 3280 Q. Did you have one before the meeting at Fremont?

A. Well, I think Mr. Schantz and I called upon Mr. Bliss once or twice during the summer and discussed the situation with him and gradually from the various reports from his Department and the Guaranty Fund Commission's report and from other sources that were largely unofficial we learned that the losses were going to aggregate a much greater sum than we could ever pay and as a result of this information we called a conference of thirty-five bankers in Fremont.

3281 Q. Now, subsequent to that conference in Fremont did you call upon Mr. Bliss?

A. Yes, we did.

3282 Q. At his office in the Capitol Building?

A. Yes.

3283 Q. And what conversation did you have with him regarding this matter at that time and place?

Mr. Abbott: Object as incompetent and immaterial, not proper rebuttal and not tending to prove or disprove any material issues in this case.

Mr. Campbell: Intervenors object as not binding upon them.

The Court: Overruled.

Exception.

A. The information we got from Mr. Bliss was in conformity with the information we were receiving from other sources but I don't remember specifically what he said but it seemed to be an endorsement of what we had heard as

to what the situation was developing into at that time, in [fol. 752] September, 1928.

3284 Q. How much was that deficit at that time, that is, in your mind?

Mr. Abbott: Objected to as immaterial.

The Court: Overruled.

Exception.

A. We all seemed to agree that the deficit was going to run anywhere from ten to fifteen million dollars; no one could for-see what it would be but the sum would be so great we **never could pay it.**

Mr. Abbott: Move to strike out the answer from the words "sum would be so great" as the opinion of the witness, not the statement of any fact and not proper rebuttal.

The Court: Sustained.

Exception.

3285 Q. In that conversation did Mr. Bliss say anything to you with reference to the effect of this situation upon the going banks of the state?

A. Yes, sir.

3286 Q. What did he say?

Mr. Abbott: Objected to as already having been gone over and not proper rebuttal.

The Court: Overruled.

Exception.

A. He said that if this assessment was continued that he would have on his hands approximately two-thirds of the banks of the state.

3287 Q. At that time was there any estimate made of the probable losses in the going banks?

A. I don't recall.

[fol. 753] 3288 Q. Was there any estimate made at that time of the loss in the banks being operated by the Guaranty Fund Commission?

A. I don't remember.

3289 Q. Now, Mr. Stephens, from your knowledge of the banking situation and from your experience in connection

with the Guaranty Fund matters and your knowledge of conditions in Nebraska in your opinion what will be the effect of the continuation of the special assessments upon the banks in Nebraska?

Mr. Abbott: Object as no foundation laid, not proper rebuttal, calling for the conclusion of the witness and usurping the functions of the Court.

Mr. Campbell: Intervenors add to that objection that it is not binding upon them and immaterial as to them.

The Court: I have some doubt about its being rebuttal but I will let him answer.

Exception.

A. I am of the opinion that the assessments will ultimately, if continued any considerable length of time, force a majority of the banks into liquidation.

3290 Q. And what will happen to the others?

Mr. Abbott: Object as no foundation laid, not proper rebuttal, calling for the conclusion of the witness and usurping the functions of the Court.

Mr. Campbell: Intervenors add to that objection that it is not binding upon them and immaterial as to them.

[fol. 754] The Court: He may answer.

Exception.

A. The others will nationalize and surrender their state charters.

Mr. Abbott: Move to strike the answer as the opinion of the witness.

The Court: Overruled.

Exception.

Cross-examination.

By Mr. Abbott:

3291 Q. Mr. Stephens, you are familiar, you state, with banking conditions in the State of Nebraska for the last eight years since you have been in the banking business?

A. In a general way.

Banks that don't earn that much. Many could pay it.

3311 Q. After paying all other expenses?

A. Yes, sir.

3312 Q. And you know, as a matter of fact, that they could readily and easily pay that, don't you?

A. No, I don't know anything of the kind.

3313 Q. In your petition filed, in your petition you plead that the Guaranty Fund is now of no benefit to you as a,— it is no benefit either to the banks or to the depositors?

Mr. Sidner: Object to question as assuming something not true.

The Court: He may answer.

Exception.

A. No, it is no benefit to us.

3314 Q. And that is your primary object in this case, isn't it, Mr. Stephens?

A. Not wholly so; also it is a fraud on our depositors.

3315 Q. Well the primary object, so far as you are concerned as one of the main persons interested in this suit, is to dispense with your contributions to the Guaranty Fund because you feel it is now of no benefit to you?

A. Add "or to our depositors".

3316 Q. And no benefit to you?

A. I answered that once.

3317 Q. I will ask about the depositors later, I am asking [fol. 758] about you now.

A. It is no benefit to us at all.

3318 Q. And in taking the position that it is of no benefit to you now you are resisting the payment of further assessments, you are of course disregarding the liabilities that have accrued against the fund?

Mr. Sidner: Object as assuming facts not proved.

The Court: He may answer.

Exception.

A. We object to it for many reasons.

3319 Q. Just answer my question, "Yes" or "No."

Mr. Sidner: Your questions are so involved they can't be answered.

The Court: Let him answer.

Exception.

A. I don't think I can answer that question "yes" or "no". If you insist on that I will not answer. We are

resisting the assessments for many reasons, among them the reasons you give.

3320 Q. As far as your bank is concerned, Mr. Stephens, your earnings will permit you to pay a dividend to your stockholders and your Guaranty Fund assessments and still leave a surplus?

A. Yes, sir.

3321 Q. And that condition is true as to all other banks that are properly managed and that have no frozen paper?

A. I wouldn't say that was true.

3322 Q. Isn't that true as a general statement of fact?

A. I can answer your question if you will permit me to do so.

3323 Q. Go ahead.

[fol. 759] A. About one-third of the banks of the state are large enough and sufficiently favorably located and have large deposits and have earnings sufficient to pay this assessment and pay dividends to the stockholders: that is my rough estimation based upon——(interrupted).

3324 Q. And you have seen Exhibit 37 and noted the conditions of the other banks?

A. No, I have not seen Exhibit 37 but I have examined Exhibits 6, 7 and 8.

3325 Q. Well, if Exhibits 6, 7 and 8 do not correctly reflect the condition of those banks, then your judgment might be different?

A. Of course, if those Exhibits were false my opinion would have to be altered.

3326 Q. Have you seen Exhibit 38, being a purported recapitulation of the operations of Nebraska banks for the eighteen months ending June 30, 1928?

A. No sir, I haven't.

3327 Q. If the statements for the banks of Nebraska for the eighteen months ending June 30, 1928 show that after all expenses were paid and after all charge offs were made that 349 of them earned 10.36% and 221 earned 10.99% after paying the Guaranty Fund assessments, would you say that those banks were amply able to pay?

3328 Q. I am asking you about those figures?

A. That is a foolish question to ask me; the assessment [fol. 760] is about 8½%.

Mr. Abbott: Will you read the question?

Question read.

A. If those figures were correct, of course——

3329 Q. Yes, that would go without saying, of course.

A. Yes, sir, if the proper charge offs had been made.

3330 Q. Assuming, Mr. Stephens, the *the* capital and surplus of the 726 banks of Nebraska was approximately twenty-five million and for the eighteen months' period ending June 20, 1928 they made charge offs of approximately ten per cent, $2,233,000.00 for the eighteen months' period, and they paid the Guaranty Fund assessments and still had remaining $1,935,000.00 or about eight per cent on both capital and surplus for the eighteen months' period, would you say they were able to pay the Guaranty Fund assessments?

Mr. Flansburg: Object as trying to draw an argument from the Exhibit.

The Court: I think he might answer. He is an expert witness and his answers are as such and I will permit him to answer.

Exception.

A. I would say that the assumption that the charge offs of two million was adequate is ridiculous to start with. If it were true, then of course they could pay it.

3331 Q. If the premise is true, then they could pay it?

A. If the premise is correct and the facts are correct, which I don't believe they are.

3332 Q. You admit the fact but you deny the truthfulness [fol. 761] of the reports of the banks?

A. Yes.

3333 Q. You say the charge offs of $2,233,000.00 or approximately 10% of their capital and surplus for the eighteen months is ridiculous?

A. What would that be on their deposits? I haven't figured it on the basis you have figured it. My answer would be that the charge offs aggregate about 1½% of the deposits. I don't know what your figures are based on and I cannot give an estimate because I haven't figured them out.

3334 Q. As a banker, Mr. Stephens, you know that a charge off of approximately 10% of the gross income for an eighteen months' period is large, do you not?

A. I haven't estimated it on income. If you will confine it to the deposits, then I will be able to answer your question. If it is 1½% on deposits, that is what I think it ought to be.

3335 Q. Are you familiar with the charge offs of your bank during the past few years?

A. Yes, sir.

3336 Q. What have been the gross earnings of your bank and the charge offs?

A. I don't know what the gross earnings are but we know what the charge offs have been.

3337 Q. What are the approximate earnings?

A. I don't know. I can get them.

3338 Q. What have the charge offs been in the last five years?

[fol. 762] A. Approximately 1% on our deposits.

3339 Q. Approximately 1%?

A. Yes, sir, something like $60,000.00.

3340 Q. That is for the five year period?

A. Yes, sir.

By Mr. Gaines:

3341 Q. One per cent a year?

A. Yes, sir, five per cent for the five years.

By Mr. Abbott:

3342 Q. Your deposits are approximately $1,700,000.00?

A. For the last year they have averaged much less than that.

3343 Q. What is it for the five year period?

A. From a million to a million and a half.

3344 Q. Then your charge offs have run, apparently, less than one per cent?

A. Just about one per cent, the average for the five year period.

3345 Q. Had you any experience in the banking business prior to 1920?

A. No, except as a director.

3346 Q. You have gained your experience in the last eight years?

A. Yes.

3347 Q. And your charge offs will probably be appreciably less in the next five years than in the last five years?

A. I think they will; I hope it will be a different period.

3348 Q. Then it is the period that has largely influenced [fol. 763] your charge offs?

A. A very strong factor in it.

3349 Q. And the charge offs to which you referred and to which you refer this morning as occurring in this Federal Reserve District are grossly out of proportion to the country at large for the same period?

A. I think they are correct in this District and in other Districts in the United States, yes, sir.

3350 Q. Now, for the purpose of comparison what was the charge offs here in the Federal Reserve District for 1927?

A. This report shows 1.96%.

3351 Q. Of loans?

A. Of the loans and investments per $100.00 of invested capital, that does not mean on deposits.

3352 Q. You said on deposits this morning.

A. Not on deposits. When I was answering this question I made it $100.00 of investments, loans.

3353 Q. Now refer to 1928, what is it then?

A. 1.45%.

3354 Q. In other words, there was a reduction of about 25%?

A. Yes, sir, I should judge so.

3355 Q. Now, then, take it in the country at large for state banks for the year 1927 and what was the charge off, loss per hundred dollar of loans?

Mr. Sidner: Object as assuming a fact not in evidence.

The Court: Overruled.

Exception.

A. This shows that the losses were .67%.

[fol. 764] 3356 Q. You hold in your hand the book you had this morning, the Federal Reserve Bulletin dated December, 1928?

A. Yes, sir.

3357 Q. Now, then, referring to this Bulletin, page 877 you may state the loss on loans and investments per one hundred dollars for the country at large for state member banks for the year 1927?

A. It shows that the loss is .67%.

3358 Q. And those same state member banks for the year 1928?

A. The losses were the same.

3359 Q. And national banks for the year 1927?

A. 1.08%.

3360 Q. And for the year 1928?

A. 1.06%.

3361 Q. Then the losses in this particular Federal Reserve District were approximately three times as great as they were on the average in the country as a whole, for those two years.

A. Well hardly, the figures hardly justify that.

3362 Q. Now, Mr. Stephens, referring to the matter of the estimate of losses. You say the Department officials, back in the spring of 1926 estimated that there might be three millions of loss?

Mr. Sidner: Objected to as not properly reflecting the testimony of the witness.

3363 Q. Back in 1925 they estimated there might be three millions of loss?

A. Yes, sir.

3364 Q. And it would take the maximum assessment for [fol. 765] two or three years to pay it?

A. A couple of years the Department stated.

3365 Q. Now in 1926, a year later, additional conditions affecting the situation had developed, isn't that true?

A. Conditions affecting the banks had developed, yes, sir.

3366 Q. And they estimated then that the loss might be what, in 1926?

A. I don't recall the Department issuing any additional statement in 1926.

3367 Q. Challenging your attention to your testimony regarding Arbor Day, what year was that?

A. Arbor Day, 1925 and it was in the fall of 1925 at the State Bankers Association is where Mr. Griggs made his statement that it would take about two years to clean up the situation.

3368 Q. And progressing from 1925 on these officials enlarged their estimate of what the probable loss would be?

A. Yes, sir.

3369 Q. Now in the meantime banks had been failing?

A. Yes, sir.

3370 Q. And the losses were becoming apparent and being adjudicated, were they?

A. Yes, sir.

3371 Q. So that, as to these officials, the estimate of loss in state banks growing out of the whole period was becoming more apparent?

A. Yes, sir, I presume it was. They should have known it all the time.

[fol. 766] 3372 Q. Don't you think Mr. Griggs gave you his honest judgment about what he though- the loss would be at the last time he estimated them to you?

A. I presume he did.

3373 Q. And Mr. Bliss, as to the liabilities?

A. I assume that they did but they surely ought to have known better.

3374 Q. In other words, they should have made a better guess?

A. A guess wasn't necessary; an examination of the banks would have shown it.

3375 Q. Did not the loss increase by failures of the banks and deflation of assets by being taken over?

A. They should have known that in advance.

3376 Q. Don't you know, as a matter of fact, if the banks had not been carried on the loss would have been greater?

A. Yes, that is why we passed the Guaranty Fund Law.

3377 Q. And you were not in favor of the Guaranty Fund Act or the Guaranty Fund Commission?

Mr. Sidner: Object as incompetent, irrelevant and immaterial, the question of the Guaranty Fund Act was passed long before this man was a banker.

Mr. Abbott: Withdraw the question.

Recess.

[fol. 767] 3378 Q. Mr. Stephens, from the questions that have been asked you with reference to losses and data as contained in the Federal Reserve Bulletin, the testimony

you gave this morning and in fact all the testimony you have given when interrogated by either side has been in reference to member banks, so far as that book report is concerned?

A. Yes, sir, there is nothing else in that but member banks.

3379 Q. Now, referring to this advertising that was obtained; you say Mr. Wilson submitted the advertising plan to you that was to be carried on in the papers?

A. Yes, sir, he submitted it in the group that I described.

3380 Q. And you, on your own initiative, duplicated a little more than half of those page advertisements in the Fremont Tribune, did you not?

A. The bankers of Dodge County did.

3381 Q. Of which you were one?

A. Yes, sir.

3382 Q. As a matter of fact, all the state bankers of Dodge County sanctioned the advertisements?

A. I think they did.

3383 Q. Yes, and you paid half the entire cost of publication?

A. That is my recollection.

3384 Q. As a matter of fact Mr. Wilson told you, you testified here I believe, that he had submitted it to Mr. Griggs to see whether there was any objection to the form of the advertisements?

A. I don't know anything about that.

[fol. 768] 3385 Q. Now the matter of having obtained data from Mr. Griggs; was that—of course he had reference to figures; that wouldn't have reference to the narration of the other facts in these advertisements?

A. I don't know anything about that; all I know is what they presented to me there at Fremont.

3386 Q. Was one of the advertisements in this series an article prepared by you?

A. No, sir.

3387 Q. Now, you say the purposes of yourself and the other bankers in publishing these advertisements was to stabilize conditions?

A. Yes, sir.

3388 Q. What do you mean by stabilizing conditions?

A. Well, we were attempting to offset uneasiness that was caused by the failure of the South Dakota Guaranty Fund Law and the general failure of the banks in that state.

3389 Q. And to impress the people with the confidence in the banking situation in Nebraska?

A. Yes, sir.

3390 Q. And confidence in the Guaranty Fund?

A. Yes, sir.

3391 Q. And cause them to not only leave the deposits they then had in state banks but place on deposit other funds?

A. It might have had that effect; the purpose was to restore confidence in the banks, that we were not going to follow in the footsteps of South Dakota.

3392 Q. You saw, as you stated, all the advertisements? [fol. 769] A. Yes, sir, I saw then as they were exhibited to me after they had been written.

3393 Q. And approved of their publication?

A. Yes, I thought they were very fine.

3394 Q. Now, referring to Exhibit 13 and the subdivisions of that Exhibit. Take Defendants' Exhibit 5 with the Omaha Bee of Sunday, July 7th, showing a picture of the United States Supreme Court, "The Opinion of the Highest Court". The purpose of yourself and the other bankers of that advertisement was to convince the people that the Guaranty Fund Law had been declared constitutional by the highest court of the land and that its constitutionality could not be attacked?

A. I don't know what the purpose was, I don't know what the author thought.

Mr. Sidner: Objected to as the Exhibit speaks for itself; the witness would be incompetent to answer the question.

The Court: He may answer.

Exception.

A. I don't know what the author's purpose was.

3395 Q. I am asking you to state your purpose.

A. I had no purpose. I didn't place the advertising, never saw it until it was hurriedly gone over that night.

3396 Q. When you joined in inserting and paying for that advertisement in the Omaha Bee what was your purpose and intention?

A. The purpose of stabilizing public confidence in the banking situation.

[fol. 770] 3397 Q. And your purpose with respect to the particular advertisement referred to?

A. I don't remember. I just have a faint recollection of seeing it. What we thought at that time I don't know.

3398 Q. You joined in its insertion?

A. Yes, I believed in the advertisements, checked them over and sat in an audience with half a dozen men and had them read off to me.

3399 Q. And you may answer the direct question, as to your purpose with respect to this particular advertisement?

A. I have already answered it.

The Court: Yes, he has answered that, Mr. Abbott.

3400 Q. After July 7, 1926, until approximately the date of the filing of this suit did you ever, by advertisements or otherwise, communicate to the depositing public that you thought the law was unconstitutional?

A. No, sir.

3401 Q. Then, as far as you are concerned and the other bankers within your knowledge the public had a right to rely on this advertisement from that time on?

Mr. Sidner: Objected to as incompetent, irrelevant and immaterial, calling for information the witness is incompetent to give.

The Court: He may answer.

Exception.

A. You refer to the general advertising program?

3402 Q. The one I referred to.

A. I answered before I didn't know anything about that [fol. 771] page or any purpose for which it was included there.

Mr. Abbott: Read the question again.

Question read.

3403 Q. In other words, you didn't do anything different then until the filing of this suit?

A. No, I took no step contrary to it.

3404 Q. Now, referring to the page of the Omaha Bee, Photo Art Section, Exhibit 8 of Defendant's Exhibit 13

headed, "Do You Believe in Insurance," you are familiar with the contents of that advertisement?

A. Well, in a general way, I have a hazy recollection of it.

3405 Q. And in that advertisement the Guaranty Fund was set up as a Giant Insurance Plan.

A. Yes, as I recall.

3406 Q. Now, at the time you inserted and caused its circulation, to the extent you testified to it was your intention the public should believe that statement?

A. Yes, sir.

3407 Q. And have you, at any time from 1926 down to the present time of filing this suit, indicated to the public by advertisements or otherwise, that those statements were not true?

A. I don't think we have, I don't recall it, if I did I have lost count of it.

3408 Q. You are familiar, I believe you said, with the other advertisements of this group?

A. In a general way I remember them. In a general way only.

[fol. 772] 3409 Q. Now, have you ever, since 1926 down to the filing of this suit indicated to the public, the depositing public, by advertisements in the Omaha Bee or Fremont Tribune, that the statements of these advertisements that you published for their benefit were not to be relied upon?

A. Since we discovered they were not to be relied on we brought this suit.

3410 Q. That is the only method?

A. So far as I recall, except to protest.

3411 Q. During the years 1926, following the publication of these advertisements by your bank and others and the year 1927 down to the latter part of 1928 the depositing public reading these advertisements had no communication from you of any kind questioning the accuracy of the statements made?

A. No, so far as I recall.

3412 Q. And so far as I know they continued to rely on those statements.

A. Yes, and so did we.

3413 Q. Now the Fremont Tribune is a paper of extensive circulation as you know?

A. Yes, sir.

3414 Q. And you are familiar with the territory it covers?

A. Yes, sir.

3415 Q. The Tribune, as you know, circulates largely in the towns of Dodge County?

A. Yes, sir.

3416 Q. Now, during the period since you published these [fol. 773] advertisements three of the banks that joined with you in publishing them are now in the hands of the guaranty Fund Commission and one, I believe, is in receivership?

A. Yes, sir.

3417 Q. That is the Dodge State Bank at Dodge, Nebraska, that is in the hands of the Commission and the Scribner State Bank is in the hands of the Commission?

A. Yes, sir.

3418 Q. And the First State Bank of North Bend is either in the hands of the Commission or about to be put in receivership?

A. Yes, sir.

3419 Q. Now, then, you and the other banks of Dodge County, especially, joined in the Dodge County advertisements in the Fremont Tribune and in the Omaha advertisements, repeated to the depositors of Dodge County the matters and things contained in these advertisements?

A. Yes, sir.

3420 Q. And at that time these three banks were going banks?

A. Yes, sir.

3421 Q. And you intended and all the other banks of Dodge County intended that the depositors in those banks and the people of Dodge County should rely on those advertisements in putting their money in the banks and put new funds in them?

Mr. Sidner: Objected to as incompetent, irrelevant and immaterial, witness not being competent to testify.

The Court: Sustained.

Exception.

[fol. 774] 3422 Q. That was the purpose of the publication?

Mr. Sidner: Object as repetition, as it has already been answered.

The Court: He may answer.

Exception.

A. Our intention was what I have said several times before, it was to stabilize the banking situation which we thought was being misrepresented by the debacle in South Dakota.

3423 Q. That was the principal influence, was it?

A. That was the purpose, I will state it in my own way.

3424 Q. And as part of the advertising campaign you got, I think, and circulated the questionnaire read in evidence here?

A I don't recall whether that was preceding this joint advertising campaign, the records will show that. I admit the authorship of it if that is what you refer to.

3425 Q. Did you say, Mr. Stephens, that you made a number of addresses in advocacy of the Guaranty Fund?

A. Not a great many, a few, here and there in banker groups and now and then I have spoken a few minutes at various associations.

3426 Q. And have you attended out of the state meetings, the reports of which have been published in Nebraska?

A. Where I spoke in behalf of the Guaranty Fund?

3427 Q. Yes.

A. I don't recall at the moment any specific date I filled for that purpose. That's my recollection on it.

3428 Q. You addressed the American Bankers Association in Houston?

A. Yes, sir, but not on the subject of the Guaranty Fund. [fol. 775] 3429 Q. That had reference to the supervision of banks?

A. Yes, sir.

3430 Q. You addressed certain bodies of bankers in Iowa?

A. I think, I don't recall any convention I addressed in Iowa. I think I addressed a committee of the Legislature, the House.

3431 Q. In advocacy of the Guaranty Fund Law?

A. Rather in answering a multitude of newspaper reports that were spread broadcast in regard to the situation in Nebraska.

3432 Q. Now, ever since you have been in the banking business and down until about the time this suit was filed you have been a consistent advocate of the Guaranty Fund Law?

A. Yes, I have believed in it, believed it would ultimately succeed, up to that time.

3433 Q. And since you took a different position, when did you first take a different position?

A. Well, it came on through the summer of 1928 I began to doubt the ability of the Guaranty Fund to pay out.

3434 Q. During that period you have made a number of addresses and published articles with reference to the accumulation of liabilities in the Guaranty Fund?

A. I don't know just what you mean by addresses; I have discussed it here and there in groups where we have come together for that purpose and I might have incidentally referred to it in other addresses I have given.

3435 Q. And you have given various reasons for the conditions?

A. I presume I have.

[fol. 776] 3436 Q. And you never, until the time you filed this suit, ever raised a question of the ability of the banks to pay the Guaranty Fund assessments?

A. Well, prior to that I never had any doubt that the fund would ultimately pay out with the cooperation of the Banking Department.

3437 Q. And you have always attributed the accumulation of liabilities to other causes, haven't you?

A. I never knew how perfectly incompetent the Banking Department was. No I haven't,—other than what?

3438 Q. Other than the payment of the assessments?

A. Read the question, please.

Question read.

A. Ask it over again, it does not seem to fit the situation.

3439 Q. You have testified as to the estimate of the liabilities in the Guaranty Fund? Haven't you?

A. Yes, sir.

3440 Q. And you are familiar with that?

A. Yes, sir.

3441 Q. And have been for the times past you testified to?

A. Yes, sir.

3442 Q. Now, then, you have given various reasons for the existence of that liability and the amount of it?

A. Yes, and there are various reasons.

3443 Q. You never, until about the time you started this suit, attributed that to the burden or weight of the Guaranty Fund assessment, did you?

[fol. 777] A. Now by that do you mean that my whole decision to bring this suit was based on the burden of the assessments?

3444 Q. No, I mean just what I asked.

A. I don't understand. If I did I would answer you quickly.

Mr. Abbott: Read the question.

Question read.

3445 Q. Now, you don't attribute the cause of the present liability in the Guaranty Fund to the assessments?

A. Not wholly; of course some of the banks failed as a result of the assessments.

3446 Q. You never had made that charge until about the time you started this suit?

A. Since we discovered the whole situation, upon investigation, was considerably different than what we thought it was, we then began to realize the failure of the situation was due to the mismanagement of the Banking Department through all these years.

3447 Q. That is your explanation of the situation?

A. Yes, sir, coupled with the expenses there.

3448 Q. The assessments, in your judgment, cut very little figure?

A. I wouldn't say that. I think they prevented hundreds of these banks from cleaning their note cases.

3449 Q. Of course, you don't know anything about that yourself, do you?

A. Except I know their earnings haven't been adequate to assume the burden in paying the assessments, in the [fol. 778] case of many banks.

3450 Q. You haven't analysed or inspected Exhibit 37?

A. No, sir, but that is not the only authority.

3451 Q. And you haven't made a detailed examination of the figures of any considerable number of individual banks?

A. Well, I have examined a good many.

3452 Q. How many, approximately?

A. Fifty.

3453 Q. Name some of them.

A. I will not do that unless the court orders it.

3454 Q. Going banks, are they?

A. Most of them are.

3455 Q. Name any bank that isn't a going bank that you in your examination attributed its condition to the assessments paid into the Guaranty Fund?

A. The Dodge State Bank.

3456 Q. When was the Dodge State Bank organized?

A. I think about three or four years ago.

3457 Q. And at the time it was organized you were familiar with the organization?

A. I was.

3458 Q. And at that time it took over a large amount of paper that developed to be worthless?

A. Yes, sir.

3459 Q. And in the amount almost equal to its capital stock?

A. Yes, sir.

3460 Q. And that is what wrecked it?

A. Partly, yes, sir. If it could have saved its assessments——

[fol. 779] 3461 Q. What was its capital stock?

A. $25,000.00.

3462 Q. At the time it opened up it had more than $25,000.00 of bad paper?

A. I am not competent to say. The Banking Department authorized it.

3463 Q. Then the Guaranty Fund assessments didn't break it?

A. It would have reduced it even if it had a chance.

3464 Q. Any other bank in your judgment that is materially influenced by the Guaranty Fund assessments?

A. I don't recall any.

3465 Q. You can't name a single bank, can you, Mr. Stephens, that is in receivership or in the hands of the Guaranty Fund Commission, whose condition is the result of the Guaranty Fund assessment?

A. I don't know whether I could or not. By refreshing my mind I might.

3466 Q. Will you take two or three minutes and think?

A. Now what is the use of thinking when I told you I didn't recall any?

3467 Q. That is your final answer, is that, that you can't recall?

A. I can't recall it, I haven't made a specialty of that.

3468 Q. Mr. Stephens, you addressed the Legislature of Iowa on February 25, 1925?

A. I don't recall the date but somewhere about that time.

3469 Q. You may examine this Exhibit 51 and state whether or not that is a copy of the address you made to the Legislature of Iowa?

[fol. 780] A. I haven't any idea whether it is or not. I presume you took it from the newspapers. I couldn't tell you now about it without reading it all over to see whether I recognize my speech in it or not. Did you take it from the newspaper? There are no marks on it to indicate what it is.

3470 Q. I will ask to recall you later, Mr. Stephens, and in the meantime I wish you would look it over and see whether you identify it as a true copy of your speech.

A. I will be glad to do that.

Mr. Abbott: That is all.

Cross-examination.

By Mr. Campbell, for the intervenors:

3471 Q. Mr. Stephens, in your opinion would any good bank, making a fair profit, be able to pay the assessment of .6% annually without injury to itself?

A. If the profits exceeded .6%.

3472 Q. Well, would this be a fair statement: take any good bank, making a fair profit, can it pay this assessment without injury to itself and can do so to the great benefit of the state?

A. That would be a fair statement if a "good bank" meant a bank properly conducted, with adequate capital.

3473 Q. Now, Mr. Stephens, would you say that any bank that did not answer that description should survive as a [fol. 781] bank in the state of Nebraska?

A. No, it should not.

3474 Q. Then any bank that should survive to serve the people in a banking capacity in this state can, in your opinion, pay the assessments without injury to itself and to the great benefit of the state, is that correct?

A. That isn't correct, no, sir. I would have to qualify my answer. I couldn't answer that question with "Yes" or "No".

3475 Q. Well, any bank, Mr. Stephens, that can reasonably serve a community in a commercial banking business and has strength to do that can pay this assessment without injury to itself and with great advantage to the state?

A. I think almost any good bank can pay the assessment.

3476 Q. And the bank that cannot pay the assessment of .6% a year is not such a bank as, in your opinion, should survive in the banking business?

A. I wouldn't say that at all. There are many small banks that are needed in the community where they exist and when properly administered by their officers and properly supervised by the Banking Department they can serve the community and they are justified and are needed.

3477 Q. Would you call them good banks, making a fair profit?

A. They may not be making a fair profit. Conditions may be such, having been permitted to run along in such a way, that the banks find themselves in an unprofitable business, due wholly to the failure of the state to adequately supervise and direct them and creating too many of them.

3478 Q. But, under anything like normal conditions a [fol. 782] bank should not survive unless it can make a fair profit?

A. Of course, a bank should make a fair profit.

3479 Q. And if it can make a fair profit then "it can pay this assessment without injury to itself and to the great benefit of the state"?

Mr. Sidner: Object to that question, it isn't fair and its purely argumentative.

The Court: He may answer.

Exception.

A. That would depend upon what one considered a fair profit. It would have to make 8½% on its capital stock to pay this assessment alone.

3480 Q. What would be your conception of a fair profit?

A. I don't care to answer that question. I really do not know; that would be modified by the conditions, the size of the bank, and everything.

3481 Q. What did you mean by a "fair profit" in the article, Exhibit 50, on January 17, 1928?

A. I meant in that article that public confidence had been shattered in that community as a result of publicity of different kinds that was detrimental to the banking business and the failures were coming so rapidly, two having failed within a week in that neighborhood, it was raising a question in the minds of the people whether a good bank could pay that assessment and the fact that a good bank, well managed, could pay it temporarily was being set forth there in order that the public might be influenced favorably.

3482 Q. What did you mean by a "fair profit"?

A. I meant by that plenty to pay on charge offs the [fol. 783] Guaranty Fund assessments, and a safe margin to apply against other losses that might unexpectedly occur.

3483 Q. Mr. Stephens, did the article as set out in Exhibit 50 reflect your candid view?

A. Absolutely.

3484 Q. And does that still reflect your candid view?

A. They were my views at that time because I did not know at the time of the immense losses that had accumulated there and have since been discovered.

3485 Q. Would you say that Exhibit 50 does not now reflect your candid views?

A. I do not know of anything I would change other than the fact that the whole situation has changed.

3486 Q. In this statement you say the Guaranty Fund, so called, is "merely an insurance company whereby the state banks of Nebraska are the members and must pay, through an assessment, each other's loss up to the maximum amount of .6% a year". Is that still your view of the Guaranty Fund?

A. Yes, certainly that is my view of it.

3487 Q. That this association of bankers is an insurance company?

A. Yes, that is all we have claimed for it.

3488 Q. Sort of a mutual insurance company with unlimited liabilities?

A. Yes, authorized by the State.

3489 Q. Now, Mr. Stephens, in this same article you say "There is no way the Guaranty Fund can be busted"; is that correct?

A. In the sense of a corporation becoming bankrupt [fol. 784] that is correct. There is nothing to lower an assessment and after an assessment is paid it goes as far as it will go. There is nothing to change about that.

3490 Q. No matter how large this accumulation of liabilities, the banks are not required to pay more than .6%?

A. No, sir.

3491 Q. And if the deficit were today only two million instead of the larger amount it is claimed to be, your assessment would be the same?

A. Yes, sir.

3492 Q. And if the .6% is confiscatory with the present deficit it would also be confiscatory if the deficit were only a million dollars?

A. No, sir. Why would it be? You can pay a million easier than you can pay twenty million.

3493 Q. The six-tenths of one per cent is your maximum liability, isn't it?

A. Yes, sir.

3494 Q. And if that maximum liability from year to year were paid and from year to year paid the claims against the Guaranty Fund you wouldn't claim that was confiscatory, would you?

Mr. Sidner: Objected to as purely argumentative.

Mr. Campbell: I will withdraw the question and ask another.

3495 Q. Mr. Stephens, in this same statement of January 17th, set out in Exhibit 50, you state as follows: "Every year it will have two million dollars approximately with [fol. 785] which to pay losses and that will run on indefinitely or until the law is repealed or amended and that cannot take place morally until its debts are paid." Did that reflect your views at that time?

A. It did.

3496 Q. Does it reflect your views at this time?

A. It does, only we are not going to pay it, they are not our debts.

3497 Q. Now in this article or any other article you have published or joined in publishing have you stated this liability is not the banks' debt?

A. I don't recall where and when; I have spoken a great deal and I don't recall when and where I spoke on the subject.

3498 Q. Can you recall ever having stated in any public speech or in any article you have published or joined in publishing that the liability is not the liability of the banks of this country?

A. Certainly, I have always felt the state had more or less responsibility of this law because the state set up the machinery, administered it and it is the state's business.

3499 Q. My question was, have you stated the banks were not liable?

A. Many times since we started this suit.

3500 Q. But before that?

A. I never supposed it would be brought to an issue or thought we could set it up.

3501 Q. You state "this will run on indefinitely"?

[fol. 786] A. In theory that would be true; of course. I never dreamed that it would.

3502 Q. Did you, at that time, have in mind that there was anything confiscatory about the .6% assessment?

A. I had thought we would finish it in about three years.

3503 Q. But you didn't so state, you said "indefinitely", did you not?

A. That was the theory as applied to the law, the theory both that the law was on the books and in the operation of the law.

3504 Q. Your theory was that the reduction to .6% made it possible to go on indefinitely on that basis?

A. No, my theory was that the going banks, in good condition, couldn't be destroyed as a result of the payment of that assessment and could run on indefinitely as far as the solvency of the bank was concerned. I spoke of a bank in good condition with ample profits; many people believed that could be.

3505 *A.* And Mr. Stephens, at that time and at the present time it is your position that it is a duty to pay off the depositors in these failed banks?

Mr. Sidner: Objected to as calling for a conclusion of the witness and his present opinion as to what he believed as to his duty.

Mr. Campbell: Withdraw the question.

3506 Q. At that time and at the present time, Mr. Ste-
[fol. 787] phens, did you not believe and do you not believe that the assessments should go on indefinitely "or until the law is repealed or amended and that cannot take place morally until its debts are paid"?

Mr. Sidner: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer.

Exception.

A. I meant by that just what I stated a few moments ago. I was explaining to the depositors and the people of the community that the assessments would not destroy a good, solvent bank, although it was continued indefinitely—a bank of ample profits.

3507 Q. Mr. Stephens, you meant Exhibit 50 to be an assurance to the depositors of your bank and other state banks that their deposits were protected and that the Fund could and would pay them?

A. Yes, and that is what I believed, too.

3508 Q. And you were not, have not at any time, charged the depositors with any fault or blame if you were in error in holding out such inducements to them?

A. No, I would not.

3509 Q. And as far as the accumulated liabilities are concerned, Mr. Stephens, you don't entertain any doubt about the claim of depositors to be paid after the sale of the assets?

A. No, sir.

3510 Q. Mr. Stephens, in the year 1925 you knew that there was, in February of the year 1925, you knew that [fol. 788] there was a deficit of many millions of dollars, did you not, in the Guaranty Fund?

A. In February, 1925?

3511 Q. Yes.

A. No, sir, I did not.

3512 Q. I will ask you if you knew that there was to be a deficit or that there was a deficit at that time?

A. Yes, sir, Mr. Griggs stated there was a deficit of approximately two or three million dollars.

3513 Q. That there was a deficit of two or three million?

A. Yes, sir.

3514 Q. Didn't he say there was a deficit of six millions?

A. This is the net deficit; he said there was about three million dollars worth of assets turned into the Fund which would make a net deficit of three million dollars, as I recall it.

3515 Q. In other words, as early as February of 1925 you knew the banks would have to pay a deficit of three million?

A. Yes, certainly.

3516 Q. And with that knowledge,—and you had that knowledge all the time that you were making these speeches, that and the advertisements?

A. Yes.

3517 Q. Mr. Stephens, at the time of the publicity in the Omaha Bee in the year 1926, did that publicity reflect your views?

A. Yes, indeed. In a general way, of course.

3518 Q. And you made no suggestion of modifying them before they were published?

[fol. 789] A. No, sir.

3519 Q. And you expected to take the responsibility of their publication, as far as the depositors relying upon them was concerned?

A. I would confine that to the public. The object was to allay public alarm over the situation that arose in South Dakota.

3520 Q. That would include the depositors?

A. Of course, the depositors are a part of the public.

3521 Q. Do you recall making an address before the Legislature of Iowa on February 25, 1925?

A. Somewhere along about that time.

3522 Q. Mr. Stephens, in that address did you make this statement: "In Kansas, it is optional whether the banks go in or not; optional in Washington; South Dakota had, I think, only one-fifth of one percent levy. Wherever they

have had it, there has been a serious blunder made in the fundamental principles of the law back of it. No mutual insurance could ever fail that collects a premium sufficiently large to pay its losses. Let the premium pay your losses and unless you do collect an adequate premium you discredit the whole organization." Did you make that statement?

A. I don't know, I might have made it, it is a long way back to 1925.

3523 Q. Does that statement reflect your views?

A. No, not completely.

3524 Q. I will ask you if at that time you made this statement: "I am in favor of a large maximum premium—not [fol. 790] that you will ever use it probably, but in order that if you must use it, you have the power to get the money, because if you don't get the money, you discredit the whole thing"; did you make that statement?

Mr. Sidner: Object as not proper cross examination and immaterial.

The Court: I don't think it would be material.

Exception.

3525 Q. Mr. Stephens, does that reflect your views?

Mr. Sidner: Object as not proper cross examination and immaterial.

The Court: Sustained.

Exception.

3526 Q. Did you ever make such a statement in Nebraska in any of these addresses?

A. No, sir, not that I remember of.

3527 Q. Calling your attention to this statement: "The state of Nebraska made a maximum levy of one per cent, plus a special levy of one-tenth of one per cent, so it was possible for us to collect in our state one and one-tenth per cent of our deposits in any one year. We could collect ordinarily, two and one-half to four million dollars with that. You would be surprised what you can do with two and one-half million dollars. That is a good deal of money when you go to measure country banks with it, because these

banks as a rule are rather small, and when their assets are spread over liabilities, their losses are not so great." Did you ever make that statement in any of your addresses or publications in this state?

Mr. Sidner: Object as incompetent, immaterial and ir-[fol. 791] relevant.

The Court: He may answer.

Exception.

A. I don't remember. I don't even remember that manuscript you are reading.

3528 Q. Mr. Stephens, you state the publication of the articles in the Bee and in the Fremont Tribune were designed to stabilize banking. Is the retaining of deposits in banks one of the elements in stabilizing banking?

A. Indirectly it would be, of course. To keep working capital in the bank where it can be used would have a tendency to stabilize business.

3529 Q. And the precipitant withdrawal of deposits from such incidents as the South Dakota debacle would tend just the opposite, that is, not to stabilize banking, is that correct?

A. Yes, sir, that is correct.

3530 Q. And one of the objects in the minds of the men that published these articles was to stabilize banking by preventing any precipitant withdrawal of deposits through fear of the depositors of loss?

Mr. Sidner: Object as incompetent, irrelevant and immaterial.

The Court: He may answer.

Exception.

A. That would be true and in addition it would encourage business men to go ahead with their enterprises because they would feel there was no threatening situation ahead of them.

3531 Q. It would stabilize not only banking but business [fol. 792] because the two were more or less connected?

A. Yes, sir.

3532 Q. And Mr. Stephens, you had no doubt, at the time, but that these articles were influential?

A. None whatever.

3533 Q. And beneficial to the banks?

A. I think they were.

3534 They were meant to be, to have that effect?

A. Yes.

3535 Q. Mr. Stephens, you have been in close touch with the banking situation and I want to ask you this question. I believe you stated in 1921 you formed this Agricultural Loan Association and the banks handled a good many receivers' certificates, running up to over two million dollars?

A. Two and a half million as I recall it.

3536 Q. Do you know why, during the years 1921, 1922, 1923 and 1924 the assessments, the special assessments, were not made on a maximum basis?

Mr. Sidner: Objected to as incompetent, irrelevant and immaterial, this witness having no connection with those assessments and not cross examination.

The Court: Sustained.

Exception.

Mr. Campbell: I will call him as my own witness and ask that question.

3537 Q. Mr. Stephens, what collateral did the banks have that bought over two million dollars worth of certificates?

A. We had the receivers' certificates, whatever collateral [fol. 793] that constituted, with the assets of the banks all back of them.

3538 Q. So that those certificates were an entirely safe investment?

A. I think so or we would not have underwritten them.

3539 Q. And what interest did they draw?

A. Six per cent.

3540 Q. What was this Agricultural Loan Association, was that the same as the buyers of the certificates?

A. It was the Agricultural Loan Association, a combination of state bankers, that bought the receivers' certificates.

Mr. Campbell: That is all.

Redirect examination.

By Mr. Sidner:

3541 Q. Mr. Stephens, you said that you had paid dividends to your stockholders and also paid this Guaranty Fund assessments. You may state how much you paid into the Guaranty Fund and how much to the stockholders since you operated the bank.

Mr. Abbott: Objected to as immaterial.
The Court: Overruled.

Exception.

A. Since 1920 we have paid $66,182.09 into the Guaranty Fund and we have paid in dividends to our stockholders during the same period $37,000.00.

3542 Q. Mr. Stephens, is the percentage of loss greater on loans and discounts than it is on bonds?

[fol. 794] A. Yes, our percentage of loss on loans and discounts ran, for a five year period, just almost one per cent on our deposits, whereas there was no loss on our bonds.

3543 Q. And a large portion of your loan money is in bonds?

A. Yes, sir.

Recross-examination.

By Mr. Abbott:

3544 Q. And the reason you put money in the bonds at the lower rate of interest is to get that security?

A. The reason we put it into bonds is so that we can keep our bank good and can pay our depositors.

3545 Q. And the bonds are safer than loans?

A. Yes.

3546 Q. So that there is no comparison between the two?

A. Of course, if we had all our money in loans we would have twice the loss.

3547 Q. And when you said you paid $37,000 in dividends that didn't take account of the other amounts that went into undivided profits and surplus?

A. We earned $26,000 in addition to that through the same period.

3548 Q. The amount stated in your deposition?

A. Yes.

It now being four thirty P. M. the court took an adjournment until ten o'clock A. M. the following day, February 13, 1929.

[fol. 795] Wednesday, February 13, 1929, ten o'clock a. m., court convened pursuant to adjournment, trial was resumed, and the following proceedings were had and done, to wit:

Mr. Ellsworth L. Fulk, called as a witness in rebuttal on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. Flansburg:

3549 Q. State your name, please?

A. Ellsworth L. Fulk.

3550 Q. And your residence?

A. Lincoln, Nebraska.

3551 Q. Your occupation?

A. Certified public accountant.

3552 Q. With what firm are you connected?

A. With Walker and Fulk.

3553 Q. And their office is at what place?

A. At 1223 Sharp Building.

3554 Q. How long have you been engaged in that occupation?

A. Since 1920.

3555 Q. Have you made an examination of Exhibit No. 37 in this case?

A. I have.

3556 Q. And have you made an analysis of that Exhibit?

A. I have.

3557 Q. Have you compiled figures with reference to the data shown on that Exhibit, with reference to the banks and their earnings, by classifications?

[fol. 796] A. I have.

3558 Q. Have you reduced that analysis to writing?

A. I have.

3559 Q. Is Exhibit No. 52 the analysis you refer to?

A. It is.

3560 Q. Will you explain the computations which you have made there to the court, please.

A. You want explanations of all of them?

3561 Q. Yes, just explain what you have done in making up the computations, how it was made up.

A. We took Exhibit 37, the copy which we worked on is right there, and prepared from it an analysis and summaries of the earnings of the banks for the eighteen months period ending June 30, 1928.

3562 Q. And are the computations you set out on Exhibit 52 accurate and correct?

A. They are.

Mr. Flansburg: We offer in evidence Exhibit No. 52.

Mr. Abbott: No objection.

Exhibit No. 52 received in evidence, read to the Court by Mr. Flansburg and attached and made a part of this Bill of Exceptions at page 818 hereof.

3563 Q. What do the red figures on Exhibit 52 indicate?

A. The red figures indicate losses, net losses, for the eighteen months' period ending June 30, 1928.

Mr. Flansburg: That is all.

[fol. 797] Cross-examination.

By Mr. Abbott:

3564 Q. Mr. Fulk, you made this compilation based on numbers of banks, I believe. This compilation is largely based on the banks by number, numbers?

A. The number and earnings.

3565 Q. All the banks separated into classifications and numbers?

A. It was made in numbers, percentages and earnings.

3566 Q. Did you make up any compilation based on capital and investments?

Mr. Flansburg: Object as not cross examination.
The Court: Sustained.

Exception.

3567 Q. In connection with the making of this compilation did you see the Exhibit introduced here as Exhibit No. 38, purporting to be a compilation based on Exhibit 37?
A. No, I didn't see that Exhibit.
3568 Q. Did you see a copy of it?
A. No, sir.
3569 Q. In preparing this compilation that you have identified you were told the particular information to ascertain from the Exhibit 37, were you?
A. I was given Exhibit 37 and asked to make a study of it, which I did.
3570 Q. And did you make up the divisions in the manner you have indicated here?
A. I made my own divisions.
3571 Q. But the particular information to be obtained from Exhibit 37 was indicated to you?
A. Of course, I was asked to make a study of it relative [fol. 798] to earnings.
3572 Q. Yes, to particular matters.

Mr. Flansburg: Move to strike out the attempted answer of the attorney as not contained in the answer.
The Court: Sustained.

Exception.

3573 Q. Were you told to not make up this compilation to ascertain the percentage or division of earnings as to capital and investments?

Mr. Flansburg: Objected to as not cross examination.
The Court: Sustained.

Exception.

3574 Q. Did you personally make the compilation or did others assist you in making it?
A. They were made by myself and one of my accountants under my supervision.

Mr. Abbott: That is all.

Witness excused.

Mr. P. D. Marshall, called for direct examination on behalf of the plaintiffs, having been previously sworn, testified as follows:

Direct examination.

By Mr. Flansburg:

3575 Q. Mr. Marshall, have you made an examination of the examiners' reports that are on file at the Department of Trade and Commerce?

A. Yes, sir.

[fol. 799] 3576 Q. What reports did you examine?

A. The last examiners' reports.

3577 Q. Made during 1928?

A. Partly during 1929.

3578 Q. Did you make an examination of the reports during 1929?

A. Yes, the last examiners' reports in our files.

3579 Q. Of all the banks?

A. Of all of the banks which are shown on Exhibit 37.

3580 Q. Have you made, have you totaled the amount of worthless assets as reported in these examiners' reports?

A. Yes.

3581 Q. What is the total worthless assets reported in the examiners' reports with reference to these banks?

[fol. 800] A. $1,001,074.42.

3582 Q. Do those examiners' reports show also what, in the opinion of the examiner, is the probable loss on other assets?

A. Yes.

3583 Q. And as to notes, discounts, overdrafts and such items, what is the total probable loss reported by the examiners?

—. ——.

[fol. 801] 3584 Q. And as to notes, overdrafts, discounts and such items, what is the total?

A. May I ask on all the assets?

3585 Q. On everything except real estate.

A. On all the assets except real estate the total is $2,938,878.10.

3586 Q. That covers reported loss on notes, discounts, and overdrafts?

A. And other assets, except real estate.

3587 Q. Did you get the total amount of statutory bad debts?

A. Yes.

3588 Q. What was the total amount of those?

A. You have that. I would have to refer to that.

3589 Q. What is the heading from which you have taken these amounts?

A. The heading on our report is "Paper Six Months [fol. 802] Past Due" and "Demand Paper Carried Twelve Months or More" is the heading on our reports that we commonly speak of as statutory bad debts.

3590 Q. You call that statutory bad debts and that is the heading on your report?

A. That is not the heading on our report.

3591 Q. What is the total amount of those statutory bad debts?

[fol. 803] A. $1,022,625.08.

3592 Q. Mr. Marshall, you gave as worthless assets what amount?

A. $1,001,074.42.

3593 Q. And also as probable losses?

A. $2,938,878.10.

3594 Q. That is, the one included in the other or separate?

A. Separate from each other.

3595 Q. And does the one include the other?

A. No.

Cross-examination.

By Mr. Abbott:

3596 Q. These examiners' reports, Mr. Marshall, were the last examiners' reports on the particular bank?

A. Yes, sir.

3597 Q. And those reports included also the reports made during the latter half of 1928?

A. Yes, sir.

3598 Q. And some of them the fore part of 1929?

A. Yes, sir.

3599 Q. Such reports, as made, would include any items in the respective classifications that had since June 30, 1928 become, in the judgment of the examiners, doubtful or bad?

A. Yes, on those reports made since that date.

3600 Q. So that to the extent that the reports were made or the examinations were made since June 30, 1928, these totals would include those subsequent, accrued items?

Mr. Flansburg: Object as this witness cannot tell when these bad debts accrued.

[fol. 804] A. Yes, sir.

Mr. Flansburg: Move to strike answer as not being based on proper foundation.

The Court: Overruled.

Exception.

3601 Q. If an examiners' report, for instance, Mr. Marshall, was made in December, 1929, it would include the items of this particular classification computed up until the date of his report, would it not?

A. As of the date of the report, yes.

3602 Q. You may state for the record whether when the examiner makes an examination of the bank and report he makes that report up to the date of his examination and based on his estimate of the then condition, or whether he makes it up to some prior date?

A. The examiner estimates the value of all the assets of the bank on the date of his examination, as to what they are worth that day.

3603 Q. Then as to the examinations that were made during the months subsequent to June 30, 1928, those examinations would include the paper of the respective classifications up to the date of the examination?

A. I would say on the date of the examination.

3604 Q. Referring to this item of, classed worthless by the respective examiners, something over a million dollars, that is the aggregate of that classification in all the banks of the state?

A. Yes.

3605 Q. 726 banks, all the banks existing on December 31, 1928?

A. All the banks existing on December 31, 1928.

[fol. 805] 3606 Q. Now, as to those items, are they admitted as worthless by the respective banks against whom they are set up?

Mr. Flansburg: Objected to as not cross examination.
The Court: Sustained.

Exception.

3607 Q. Mr. Marshall, you are familiar with the examiners' reports from which this aggregate was obtained?
A. I think so.
3608 Q. You may state whether or not that aggregate is distributed through the banks of the state without reference to whether they are strong or weak, dividend or non-dividend paying?
A. They are.
3609 Q. And do the dividend paying banks of the state and those that have been paying dividends through the last few years have a proportion of this aggregate the same as the remainder of the banks?
A. Some proportion, yes.
3610 Q. Some proportion. Have you been present from time to time during the trial, Mr. Marshall?
A. Yes, sir.
3611 Q. And have you observed Exhibits 6, 7 and 8 introduced in evidence here?

Mr. Flansburg: Objected to as not cross examination.
The Court: Overruled.

Exception.

(Mr. Abbott displays exhibits.)

A. Yes, I have seen those.
3612 Q. Now, do the banks of the state not included in Exhibits 6, 7, and 8 have relatively about the same proportion of those items that you have aggregated here as worth-[fol. 806] less and probable loss, as do the banks in 6, 7, and 8?

Mr. Flansburg: Objected to as calling for a comparison and not proper cross examination.
Mr. Abbott: Withdraw the question and put one general question.

3613 Q. Now do the banks of the state not included in Exhibits 6, 7 and 8, do a large number of the banks of the state classified as strong banks have some propoetion of this aggregate?

Mr. Flansburg: Objected to as calling for a conclusion as to what are classified "strong banks" and not proper cross examination.

The Court: Sustained.

Exception.

3614 Q. Mr. Flansburg used the phrase, "statutory bad debts"; is there any such heading on any of these examiners' reports?

A. No.

3615 Q. What is the heading on examiners' reports covering the item that he has described as "statutory bad debts"?

A. It is "Paper Six Months Past Due" and "Demand Paper Carried Twelve Months or More."

3616 Q. As contained on the examiners' reports is that an arbitrary classification of such type of paper?

Mr. Flansburg: Object as calling for conclusion of the witness and not proper cross examination.

The Court: Sustained.

Exception.

3617 Q. Mr. Flansburg used the phrase "statutory bad debts"; does that enter into the, to any particular classifications as contained on the call reports or is it solely a list-[fol. 807] ing of paper that is past due to the extent you testified to?

Mr. Flansburg: Object as calling for conclusion of the witness and repetition.

The Court: Overruled.

Exception.

A. Yes.

3618 Q. Yes, what?

A. Yes, it is a listing of the paper past due to the extent I testified to.

3619 Q. And the question whether it is good or bad doesn't enter into it on the call reports?

Mr. Flansburg: Object as no foundation laid.

The Court: Overruled.

Exception.

A. No.

3620 Q. Now this item of probable loss you testified to as contained on these examiners' reports is the examiner's estimate of the probable loss out of a great aggregate debt as a rule?

Mr. Flansburg: Object as calling for conclusion and not proper cross examination.

The Court: Sustained.

Exception.

3621 Q. Mr. Marshall, referring to these reports from which you made up this aggregate probable loss, you may state whether or not in one column would be listed the aggregate of the debt of the particular individual and then in another column the probable loss out of that account and whether the items from which you make up your total are in this second column?

Mr. Flansburg: Object as not proper cross, and repetition, the same question just put and ruled out.

[fol. 808] The Court: Overruled.

Exception.

A. I believe "Yes" will answer that question.

3622 Q. Now, as to those items you have estimated probable loss where there is security for the debt such fact also appears opposite the particular item in that report?

Mr. Flansburg: Object as not proper cross examination.

The Court: Sustained.

Exception.

3623 Q. At the time, Mr. Marshall, you were asked to make up this compilation by counsel you were asked to include the loss on real estate as disclosed by the examiners' reports. Did you make up such a compilation as a part of this complication?

Mr. Flansburg: Object as assuming a fact not proved and not proper cross examination.

The Court: Sustained.

Exception.

Mr. Abbott: That is all.

Witness excused.

Mr. VAN E. PETERSON, called as a witness on behalf of the intervenors, having been previously sworn, testified as follows:

Direct examination.

By Mr. Campbell:

3624 Q. You testified before and have been sworn?

A. Yes, sir.

[fol. 809] 3625 Q. Please state the total gross assets that have been turned over to the Guaranty Fund Commission since its operation down to date.

A. I cannot give you that; I can give you the amount of the assets in the 269 banks closed since the Depositors Guaranty Law took effect in January, 1911.

3626 Q. That is what I want.

A. $81,208,798.08.

3627 Q. What is the total amount that has been realized from those assets up until this time?

A. The total amount of assets which have been realized upon is $47,589,058.15.

3628 Q. And the difference between those two figures is the assets which you now have on hand?

A. Yes, sir.

3629 Q. Would you kindly give us that? With the permission of the Court I will ask you to make that calculation right here.

A. It would be $33,619,739.93, the difference between this amount and the thiry-nine millions and some odd dollars I testified to formerly is the stockholders' liability which is incorrect and which we do not consider an asset of the bank but it was included in my former figures as being an asset of the creditors.

3630 Q. Now, the total liability, the fixed debt, is how much?

A. $76,228,869.46.

3631 Q. And there has been paid a sum total of how much?

A. $49,828,586.70.

3632 Q. Leaving a balance of what, Mr. Peterson?

A. Of $26,400,282.76.

[fol. 810] 3633 Q. What is the percentage of realization after the deduction of all expenses of operation and collec-

tion on the assets that have been turned over? Give the two percentages, that before the Guaranty Fund Commission took charge and the percentage after the Guaranty Fund Commission took charge.

Mr. Flansburg: Object as incompetent, irrelevant and immaterial.

No ruling by the Court.

A. I cannot give you that division because I didn't prepare it except as a whole. I can give it approximately.

3634 Q. Let's have it that way.

A. The handling of the 58 banks before the Commission was organized, out of the 269 banks which were managed by receivers under a former system, of the thirteen million liabilities paid by them, 46% was obtained from the assets and 54% from the Guaranty Fund. Under the handling of the 211 banks by the Commission, approximately 75% of those liabilities were paid from the assets and 25% from the Guaranty Fund. The total over the entire period of the operation of the Guaranty Fund Law in the payment of $49,000,000 of deposits, 33% has been drawn from the Guaranty Fund and 67% realized from the assets.

3635 Q. Now, Mr. Peterson, these assets that are turned and have been turned in, are they the same general character of assets and of the same average realization over the period of your observations, would they be about the same?

Mr. Flansburg: Object as witness has previously analysed them.

The Court: He may answer.

Exception.

[fols. 811-813] A. They are, except for the change in condition which I testified to before and which has reduced the value of the assets from ten to fifteen per cent owing to conditions at this time.

3636 Q. That was in connection with real estate, you testified before?

A. Yes.

3637 Q. What is the date farthest removed of liabilities, unpaid liabilities to depositors in the Guaranty Fund Commission?

Mr. Flansburg: Object, the claims are all on file.

The Court: He may answer.

Exception.

A. November 30, 1927.

3638 Q. You say all paid up to date, until that time?

A. Yes, we are now.

3639 Q. You referred to what sort of claims when you gave the date of November 30, 1927?

A. Claims adjudicated by the Court and ordered paid from the Depositors Guaranty Fund.

Mr. Campbell: That is all.

Witness excused.

[fol. 814] Mr. Ellsworth L. Fulk, recalled for further cross-examination by the defendants, and having been previously sworn, testified as follows:

Cross-examination.

By Mr. Abbott:

3640 Q. Mr. Fulk, referring to your compilation, Exhibit No. 52, you have a list of the forty-eight banks designated in the second item of the Exhibit, "Net Earnings After Charge Offs For 18 Months' Period Ending June 30, 1928?"

A. Not with me.

3641 Q. Have you it at your office?

A. Yes, sir.

3642 Q. And you have a similar list at your office with respect to the next item, eighty-seven banks?

A. Yes, sir, it is either at my office or in another office, I am quite certain I can obtain it, I prepared such a list.

3643 Q. And similar lists as to the one hundred fifty banks you classify?

A. Yes, sir.

3644 Q. And the two hundred fifty-four?

A. I am not sure, I think I just ran an adding machine tape on the two hundred fifty.

3645 Q. You have the adding machine tape?

A. I couldn't say.

3646 Q. And as to the two hundred fifty-four in number, [fol. 815] do you have a list of those?

A. I did not list those because I computed the banks that were earning more than 6% and when I took it off of thirty-seven I just left them out.

3647 Q. And the four hundred ten banks, you have a list of those?

A. No, I have not a list of those.

3648 Q. You computed that by deduction?

A. Yes, sir.

3649 Q. In the last item, one hundred seventy-six, you get the percentage of computation on, I take it you have that list?

A. Not a separate list. I took off my information that I wanted and summarized it and made my report from it. I didn't list all the banks separately as that was too much work.

3650 Q. Will you kindly obtain at your office and produce here the list of banks that you stated you have and your adding machine tape list of the others?

Mr. Flansburg: Object to being required to produce all that data, there is no reason at all why the record should be so encumbered.

The Court: Overruled. The data should be confined to summaries that have been introduced.

Exception.

It now being twelve o'clock, noon, adjournment was taken to one thirty p. m. of the same day, February 13, 1929.

[fol. 816] February 13, 1929, one thirty o'clock p. m., Court convened pursuant to adjournment, trial was resumed, and the following proceedings were had and done, to wit:

Mr. Ellsworth L. Fulk resumed the stand for further cross-examination by the Defendants.

By Mr. Abbott:

3651 Q. Mr. Fulk, do you have present in Court with you the memoranda you were asked this morning to produce?

A. I do.

3652 Q. Referring to Exhibit 52 you may refer to the list of forty-eight banks that you have identified on Exhibit No. 52 as contained on your memoranda.

A. You want me to name them?

3653 Q. Just point them out. You may refer to your memoranda that you hold in your hand and referring to the sheets identified as Exhibit No. 55, is that your compilation?

A. This is the compilation from which I prepared the summary submitted this morning.

3654 Q. Now, as to the list of banks which you named in the Exhibit No. 52 as consisting of forty-eight, do you have any separate list of that, other than this Exhibit 55?

A. I do not.

3655 Q. And referring to the list of banks aggregating eighty-seven banks, do you have any other list than this one?

A. I do not.

3656 Q. Then, so far as you know, the only way we would be able to check your forty-eight and eighty-seven is by referring to this list?

[fol. 817] A. By counting this list.

3657 Q. It is so important you count it so as to know how you figured?

A. All the information I gathered is off this Exhibit and Exhibit 37.

Mr. Abbott: I think I will have to introduce this as part of the cross examination.

Mr. Flansburg: Object as this is not part of the cross examination.

The Court: Objection sustained.

Exception.

3658 Q. You may read into the record, or rather I can simplify it. The names of the banks opposite the last column on this Exhibit 55 are the names of the forty-eight banks? Are they?

A. Yes, sir; by the last column you mean the last one to the right?

3659 Q. Yes, the last to the right. And the list of the

eighty-seven banks are the names opposite the next to the last column to the right?

Mr. Flansburg: Object as referring to a document not in evidence.

The Court: Objection sustained.

Exception.

Mr. Abbott: That will be all.

Witness excused.

[fol. 818] EXHIBIT NO. 52 RECEIVED IN EVIDENCE

Raymond H. Walker, C. P. A. (Nebr.) Ellsworth L. Fulk, C. P. A. (Nebr.)

Walker & Fulk, Certified Public Accountants, Lincoln, Nebraska

The following figures were taken from Exhibit #37, prepared by defendant, covering the operations of 726 state banks of Nebraska for the 18 months' period ending June 30, 1928.

	Number of Banks		Amount Earned	
	Number	Percentage of Total Banks	Amount	Percentage of Net Earnings
Net Earnings After Charge Offs for 18 Months' Period Ending June 30, 1928....	726	100.00%	$1,935,519.40	100.00%
Net Earnings After Charge Offs for 18 Months' Period Ending June 30, 1928....	48	6.61%	876,595.44	45.29%
Net Earnings After Charge Offs for 18 Months' Period Ending June 30, 1928....	87	11.98%	1,192,729.82	61.62%
Net Loss After Charge Offs for 18 Months' Period Ending June 30, 1928....	156	21.48%	558,889.54*	
Earning Banks Whose Profits After Charge Offs for 18 Months' Period Ending June 30, 1928, were Less than 6% per Annum on Combined Capital and Surplus as of June 30, 1928	254	34.99%	379,718.75	19.62%
[fol. 818a] Banks Whose Net Earnings After Charge Offs for 18 Months' Period Ending June 30, 1928, were Less than 6% per Annum				

*Red in copy.

Exhibit No. 53—Continued

	Number of Banks		Amount Earned	
	Number	Percentage of Total Banks	Amount	Percentage of Net Earnings
on Combined Capital and Surplus as of June 30, 1928	410	56.47%	179,170.79*	
24.24% of the Total Banks Earned 76.21% of the Total Net Earnings of All Banks for the 18 Months' Period Ending June 30, 1928	176	24.24%	$1,475,050.50	76.21%

[fol. 819] Exhibit No. 53 Received in Evidence

Copy

Exhibit "A"

Year chartered	Place of business	1/4 of 1%	Name of bank
1904	Abie	459.38	Abie State
1918	Adams	578.90	Adams State
1903	Ainsworth	605.64	Citizens State
1908	Albion	995.80	Citizens State
1919	Albion	1718.74	Farmers State
1919	Alliance	672.90	Guardian State
1900	Alma	624.88	Harlan County Bank
1901	Alvo	469.42	Farmers & Merchants
1908	Amherst	192.87	Commercial State
1909	Anoka	234.07	Boyd County Bank
1903	Anselmo	699.22	Anselmo State
1915	Ansley	534.62	Security State
1894	Arapahoe	1108.79	Arapahoe State
1905	Arapahoe	925.68	Citizens State
1888	Arcadia	915.18	Arcadia State
1890	Arlington	1395.80	Arlington State
1917	Arnold	408.76	Security State
1916	Arthur	176.54	Arthur State
1913	Ashby	243.16	Grant County State
1883	Ashland	2731.27	Farmers & Merchants
1908	Ashton	649.56	Ashton State
1888	Ashton	632.25	Bank of Ashton
1914	Atkinson	1225.26	Security State
1903	Atlanta	277.20	Atlanta State
1906	Auburn	.....	Auburn State—523.67
[fol. 819a]			
1910	Aurora	2226.44	Farmers State
1906	Aurora	2100.13	Fidelity State
1915	Avoca	.....	Farmers State—909.08
1884	Axtell	1015.32	Bank of Axtell
1907	Axtell	324.23	Farmers & Merchants
1912	Ayr	271.60	Farmers State
1892	Bancroft	732.75	Citizens Bank
1906	Barada	130.41	Barada State

*Red in copy.

Exhibit No. 53—Continued

Year chartered	Place of business	1/4 of 1%	Name of bank
1890	Barneston	424.99	Bank of Barneston
1903	Barneston	279.02	Commercial State
1906	Bartlett	166.31	Bartlett State
1897	Bartley	678.80	State Bank of Bartley
1902	Bassett	706.03	Commercial Bank
1919	Battle Creek	621.51	Farmers State
1880	Battle Creek	1707.10	Battle Creek Valley
1880	Bayard	1152.91	Bank of Bayard
1908	Beatrice	2140.98	Beatrice State
1909	Beatrice	282.47	First State Savings
1914	Beatrice	1007.05	Nebraska State
1920	Beatrice	482.29	Security Savings
1902	Beatrice	1626.19	Union State
1898	Beaver City	1059.80	First State
1905	Beaver Crossing	.....	Citizens State—532.97
1902	Bee	850.31	State Bank of Bee
1910	Belgrade	621.55	Farmers State
1902	Bellwood	490.40	Bank of Bellwood
1886	Belvidere	589.67	State Bank of Belvidere
1919	Benkelman	564.14	Farmers & Merchants State
1928	Bennington	.....	Bank of Bennington—350.55
1885	Bertrand	1031.57	First State

[fol. 8196]

1924	Berwyn	224.93	Farmers State
1905	Bethany	397.46	First State
1906	Big Springs	1120.58	Farmers State
1904	Blair	1230.24	Citizens State
1919	Blair	2100.25	Farmers State
1891	Bloomfield	1143.10	Farmers & Merchants State
1901	Blue Springs	511.02	Blue Springs State
1885	Boelus	733.19	Boelus State
1904	Brady	626.32	Bank of Brady
1886	Brainard	1318.72	Bank of Brainard
1915	Brainard	530.56	Brainard State
1906	Brainard	643.58	Farmers State
1924	Bristow	226.83	Nebraska State
1889	Brock	259.24	Bank of Brock
1899	Broken Bow	1545.73	Broken Bow State
1917	Broken Bow	1165.83	Nebraska State
1905	Broken Bow	1068.79	Security State
1919	Brule	567.80	Farmers State
1880	Bruno	628.07	Bruno State
1912	Bruno	602.38	Farmers & Merchants
1902	Brunswick	586.06	Brunswick State
1928	Burchard	333.35	State Bank of
1892	Burr	414.83	American Bank
1913	Burton	231.11	Burton Bank
1923	Bushnell	448.33	American State
1902	Byron	624.13	Farmers & Merchants
1908	Burwell	1119.10	Farmers Bank
1887	Burwell	1003.12	First State
1902	Cairo	495.80	Cairo State
1910	Cairo	587.24	Farmers State
1906	Callaway	1532.05	Farmers State

Exhibit No. 53—Continued

[fol. 8196]

Year chartered	Place of business	1/4 of 1%	Name of bank
1887	Callaway	686.29	Seven Valley State
1907	Cambridge	447.57	Cambridge State
1907	Campbell	486.92	Farmers State
1890	Carleton	644.62	Citizens State
1925	Carroll	938.02	Carroll State
1887	Cedar Bluffs	991.69	Bank of Cedar Bluffs
1892	Cedar Bluffs	1086.83	Farmers and Merchants
1883	Cedar Rapids	65.15	Citizens State
1919	Cedar Rapids	590.58	Farmers State
1902	Center	529.73	Center State
1892	Central City	1515.98	Platte Valley State—1515.98
1911	Ceresco	1097.67	Farmers & Merchants
1915	Chalco	342.04	German American State
1917	Chapman	433.13	Farmers State
1912	Chappell	1478.84	Chappell State
1919	Chappell	564.46	Deuel County State
1910	Chester	467.47	Chester State
1886	Chester	380.87	Farmers State
1890	Clarkson	1994.60	Clarkson State
1905	Clarkson	1590.43	Farmers State
1919	Clatonia	311.28	Clatonia State
1896	Clatonia	678.43	Farmers Bank
1906	Clay Center	629.39	Clay Center State
1887	Clay Center	720.82	Commercial State
1899	Cody	653.12	Bank of Cody
1917	Cody	519.63	Ranchers State
1917	College View	686.52	Farmers State
1899	Colon	901.81	State Bank Of
1917	Columbus	2471.95	Farmers State
1906	Comstock	835.23	Citizens State

[fol. 8197]

1909	Comstock	745.40	Farmers & Merchants Bank
1890	Cook	769.08	Farmers Bank of
1918	Concord	757.90	Farmers State
1910	Cortland	643.31	Farmers State
1905	Cotesfield	742.61	First State
1884	Creighton	2239.40	Bank of Creighton
1898	Creston	1124.79	Citizens State
1882	Crete	1147.81	First State
1917	Crookston	449.52	Farmers State
1886	Culbertson	1187.04	The Culbertson Bank
1911	Curtis	828.63	Curtis State
1886	Curtis	1101.35	Security State
1906	Cushing	184.44	Cushing State
1888	Dakota City	1083.66	Bank of Dakota City
1908	Dalton	589.44	Dalton State
1917	Dalton	506.13	Farmers State
1888	Danbury	798.84	Bank of Danbury
1894	Davenport	1309.70	Jennings State
1903	Davey	585.26	Farmers State
1909	David City	1445.40	Butler County State
1909	David City	433.40	City Savings Bank
1895	Daykin	512.71	Jefferson County Bank

Exhibit No. 53—Continued

Year chartered	Place of business	1/4 of 1%	Name of bank
1906	Denton	294.17	Denton State
1914	Deshler	590.03	Deshler State
1908	Deshler	775.70	Farmers & Merchants
1882	DeWitt	757.07	Farmers & Merchants
1903	DeWitt	754.23	Home State Bank
1915	Dickens	235.76	First State
1914	Diller	756.80	Citizens State
1904	Diller	756.80	Diller State
1886	Doniphan	737.97	Bank of Doniphan
[fol. 819e]			
1911	Dorchester	470.96	Bank of Dorchester
1907	Dorchester	1326.69	Citizens State
1919	Douglas	315.39	Farmers State
1886	Dubois	811.42	State Bank of
1907	Dunbar	862.59	Farmers Bank
1904	Dwight	884.56	Dwight State
1892	Eagle	713.43	Bank of
1903	Eddyville	408.03	Ed-yville State
1882	Edgar	880.55	Clay County State
1879	Edgar	931.54	State Bank of
1917	Edison	727.91	Farmers & Merchants
1919	Elgin	1113.75	Farmers & Merchants
1900	Elba	517.20	Elba State Bank
1917	Eli	176.19	Your Bank of Eli
1893	Elk Creek	464.97	State Bank of
1915	Elkhorn	337.96	Farmers State
1888	Elkhorn	1336.45	State Bank of
1907	Ellis	168.04	Ellis State
1889	Elmwood	1044.13	American Exchange
1914	Elmwood	391.65	Elmwood State
1907	Elsie	506.77	Commercial State
1918	Elsie	462.92	Equity State
1910	Elwood	572.11	The Home Bank
1910	Elyria	248.62	Elyria State
1890	Emerson	1165.16	Farmers State
1907	Emmet	355.78	Emmet State
1917	Enders	182.63	First State
1905	Ericson	432.37	Ericson State
1889	Eustis	930.43	Farmers State
1906	Eustis	797.16	Pioneer Bank
[fol. 819f]			
1873	Fairbury	5593.71	Harbine Bank of
1895	Falls City	1430.98	Falls City State
1919	Falls City	1322.85	Nebraska State
1880	Falls City	2536.06	Richardson County Bank
1904	Farnam	386.98	Farnam Bank
1902	Farnam	848.31	State Bank
1903	Farwell	380.64	Farwell State
1907	Farwell	437.18	First State
1901	Filley	607.20	State Bank of
1891	Firth	739.06	Firth Bank
1907	Fordyce	1038.43	Fordyce State
1914	Fort Calhoun	542.06	Fort Calhoun State
1889	Fort Calhoun	452.88	Washington County Bank

Exhibit No. 53—Continued

Year chartered	Place of business	1/4 of 1%	Name of bank
1912	Foster	457.62	Farmers & Merchants
1894	Franklin	719.35	Franklin Exchange
1901	Franklin	444.92	Franklin State
1904	Fremont	4422.25	Fremont State
1918	Friend	766.37	Friend State
1884	Friend	828.79	Merchants and Farmers
1905	Funk	480.60	Funk State
1904	Garland	935.60	Germantown State
1928	Giltner	548.06	Giltner State
1918	Gladstone	148.86	State Bank of
1909	Glenvil	949.01	Farmers State
1889	Glenvil	578.77	State Bank of
1903	Goehner	413.17	Goehner State
1919	Gordon	501.99	American Bank
1915	Gothenburg	525.29	Farmers State
1906	Gothenburg	1900.71	First State—1900.71
1902	Graf	254.10	Bank of
[fol. 819g]			
1901	Grand Island	2829.07	Commercial State
1917	Grand Island	4412.72	Nebraska State
1919	Grand Island	1491.56	Peoples State
1910	Gresham	597.68	Gresham State
1910	Gretna	1338.14	Bank of Gretna
1885	Guide Rock	628.63	Bank of Guide Rock
1917	Gurley	458.04	Farmers State
1916	Haig	90.93	State Bank of
1919	Hallam	345.17	Farmers State
1898	Hallam	424.95	Hallam Bank
1912	Hampton	575.10	Farmers State
1912	Hansen	154.01	Hansen State
1905	Harbine	245.77	State Bank of
1890	Harrisburg	360.13	Banner County Bank
1915	Hartington	1166.11	Cedar County State—1166.11
1918	Hastings	4905.13	State Bank of
1900	Havelock	690.35	Farmers & Merchants
1918	Havens	117.04	State Bank of
1913	Hayland	545.09	First State
1890	Hay Springs	903.53	Northwestern State
1907	Hazard	445.24	Hazard State
1905	Heartwell	574.26	Heartwell State
1914	Hebron	1032.30	Hebron State
1874	Hebron	1343.02	Thayer County Bank
1889	Henderson	557.07	Bank of Henderson
1902	Henderson	483.91	Farmers State
1905	Hendley	334.19	Farmers State
1907	Herman	865.74	Herman State
1888	Herman	1699.18	Plateau State
1903	Hershey	718.49	Bank of Lincoln Co.
[fol. 819h]			
1902	Holbrook	956.05	Bank of Holbrook
1917	Holbrook	408.32	Security State
1912	Holdrege	1979.09	Phellps County Bank
1925	Holdrege	575.45	State Bank
1925	Holmesville	284.45	State Bank of

Exhibit No. 53—Continued

Year chartered	Place of business	1/4 of 1%	Name of bank
1902	Holstein	581.57	First Bank
1922	Homer	496.50	Home State
1903	Homer	728.21	Security State
1882	Hooper	1358.71	Hooper State
1915	Horace	215.91	Horace State
1907	Hordville	667.09	First State
1900	Hoskins	1225.85	Hoskins State
1899	Howe	161.47	Bank of Howe
1887	Howells	2015.83	Colfax County
1902	Howells	2703.51	Howells State—2703.51
1903	Hubbard	431.25	Hubbard State
1881	Hubbell	459.86	Hubbell Bank
1915	Humboldt	1444.49	Home State
1904	Humboldt	858.67	Nebraska State
1915	Humphrey	1078.76	Farmers State
1905	Huntley	231.29	State Bank of
1897	Hyannis	1420.51	Bank of Hyannis
1887	Imperial	1004.33	Farmers & Merchants
1906	Indianola	827.76	Farmers State
1912	Inland	284.47	Farmers State
1918	Irvington	232.36	State Bank of
1902	Ithaca	491.62	Farmers State
1901	Jansen	280.00	Bank of Julian
1892	Julian	407.76	State Bank of
1916	Johnson	759.90	First State

[fol. 8191]

1878	Juniata	486.98	State Bank of
1917	Kearney	1640.00	American State
1890	Kearney	3389.51	Farmers State
1906	Keene	264.46	Farmers State
1908	Kenesaw	701.60	First State
1884	Kenesaw	400.23	Kensaw State
1915	Kennard	542.54	Home State
1909	Keystone	368.38	Bank of Keystone
1919	Kilgore	365.64	Farmers State
1917	Kimball	1948.70	American State
1886	Kimball	1557.07	Bank of Kimball
1911	Kramer	297.34	Farmers State
1906	Lanham	541.76	State Bank of
1887	Lebanon	645.64	State Bank of
1910	Leigh	1308.17	Leigh State
1916	Lemyone	287.19	Lemoyne State
1906	Leshara	447.64	Leshara State
1905	Lewellen	703.74	Bank of Lewellen
1915	Lewellen	615.74	Farmers State
1901	Lewiston	180.37	Bank of Lewiston
1889	Lexington	1966.65	Dawson Co. Bank
1916	Lexington	1220.29	Farmers State
1886	Lexington	1737.13	Lexington State
1897	Liberty	872.09	State Bank of Liberty
1909	Lincoln	10083.15	Continental State
1911	Lincoln	6007.62	Nebraska State
1900	Lindsay	650.26	Farmers & Merchants
1887	Linwood	962.77	Farmers & Merchants
1909	Lisco	525.76	Lisco State

Exhibit No. 53—Continued

[fol. 819j]

Year chartered	Place of business	1/4 of 1%	Name of bank
1882	Lodgepole	746.48	First State
1900	Loomis	388.45	Farmers State
1884	Louisville	881.13	Bank of Commerce
1890	Lorton	319.06	Bank of Lorton
1915	Louisville	453.74	Home State Bank
1904	Loup City	1035.08	Loup City State
1889	Lynch	655.08	Bank of Lynch
1901	Lynch	512.24	Farmers State
1880	Lyons	1023.58	The Farmers Bank
1903	Macon	130.91	Macon State
1918	Madison	1116.45	State Bank of Madison
1893	Malmo	855.46	Farmers & Merchants
1917	Malmo	267.21	Malmo State
1907	Manley	296.40	Manley State
1905	Martell	570.80	Martell State
1923	Maskell	401.16	Security State
1911	Mason City	431.18	Farmers State
1900	Mason City	431.18	Mason City Banking Co.
1916	Maywood	957.35	Farmers Security Bank
1920	McCook	1883.80	Farmers & Merchants State
1904	McCool Junction	360.74	Farmers & Merchants Bank
1924	McGraw	192.28	Farmers State
1901	McLean	409.48	McLean State
1887	Mead	956.06	Bank of Mead
1905	Meadow Grove	674.61	Security Bank
1913	Melbeta	327.49	State Bank of
1886	Merna	461.23	Bank of Merna
1900	Merriman	551.69	Anchor Bank
1916	Millard	754.42	Farmers State

[fol. 819k]

1892	Millard	602.76	German Bank of Millard
1890	Miller	413.50	Bank of Miller
1887	Miller	396.39	First Bank of
1914	Minden	1021.34	Minden State
1919	Mitchell	733.24	The American Bank
1892	Monroe	662.13	Bank of Monroe
1904	Moorefield	274.41	Bank of Moorefield
1891	Morse Bluff	1123.39	Bank of Morse Bluff
1909	Mullen	616.75	The Citizens State
1902	Murdock	867.84	Bank of Murdock
1900	Murray	836.89	Murray State
1884	Nebraska City	2050.00	Farmers Bank
1888	Nehawka	580.33	The Nehawka Bank
1923	Neligh	1574.02	Antelope State
1910	Neligh	1352.93	Security State
1894	Nelson	843.28	Commercial Bank
1901	Nemaha	338.99	Bank of Nemaha
1915	Nenzel	167.97	Henzel State
1909	Newman Grove	982.08	Farmers State
1916	Nickerson	469.00	Farmers State
1913	Niobrara	942.86	State Bank of
1906	Nora	400.62	Nora State
1909	Norden	140.68	Bank of Norden
1913	Norfolk	5240.00	Nebraska State

Exhibit No. 53 - Continued

Year chartered	Place of business	1/4 of 1%	Name of bank
1913	Norfolk	742.86	Norfolk Savings
1920	Norfolk	1775.61	Security State
1906	Norman	145.54	Norman Exchange
1878	North Platte	3004.18	McDonald State
1919	North Platte	429.92	Union State

[fol. 8196]

1898	Oak	108.82	Scroggin & Co
1909	Oakland	995.41	Oakland State
1909	Obert	46.00	Farmers State
1905	Oconto	804.08	Farmers Bank
1901	Oconto	491.29	Columbia State
1903	Odell	454.94	Hinds State
1907	Odell	360.79	State Bank of Odell
1888	Ogallala	189.14	Citizens Bank
1919	Ogallala	1040.14	Farmers State
1904	Omaha	1431.17	Bank of Florence
1907	Omaha (Benson)	293.19	Farmers & Merchants
1881	Omaha	2812.94	South Omaha Savings
1914	Omaha	4230.56	South Omaha State
1912	Omaha	17,667.56	State Bank of Omaha 17,667.56
1917	Omaha	6254.08	Union State
1889	Ong	134.36	The Exchange Bank
1905	Orchard	842.14	Citizens State
1912	Ord	1468.92	Nebraska State
1880	Ord	957.89	State Bank
1880	Orleans	709.09	Bank of Orleans
1903	Orleans	477.54	State Bank of
1921	Oshkosh	1152.90	Nebraska State
1886	Osmond	851.58	Security State
1890	Otoe	595.43	Bank of Otoe
1914	Overton	662.62	Farmers State
1904	Oxford	585.74	Bank of Oxford
1892	Oxford	798.96	Security State
1916	Palisade	336.54	Palisade State

[fol. 8197]

1891	Palmyra	481.59	Bank of Palmyra
1880	Papillion	1783.58	Banking House of A W Clarke
1905	Pauline	121.87	Pauline State
1875	Pawnee City	1741.61	Farmers State
1919	Pender	497.35	Farmers & Merchants State
1915	Pender	1887.58	Pender State
1891	Peru	1129.13	Citizens State
1921	Petersburg	1097.22	Petersburg State
1884	Phillips	390.02	Bank of Phillips
1904	Pickrell	796.55	Farmers State
1914	Pierce	1256.27	Citizens State
1882	Pierce	1068.96	Cones State
1901	Pilger	786.38	Farmers State
1924	Pilger	605.75	Pilger State
1910	Platte Center	874.73	Farmers State
1899	Platte Center	757.83	Platte County Bank

Exhibit No. 53—Continued

Year chartered	Place of business	1-4 of 1%	Name of bank
1917	Plattsmouth	1436.72	Farmers State
1904	Plattsmouth	2784.24	Plattsmough State
1902	Pleasantdale	535.57	First State
1892	Pleasanton	1258.93	Pleasanton State
1907	Polk	545.29	Bank of Polk
1919	Polk	671.77	Citizens State
1881	Ponca	1039.52	Bank of Dixon County
1917	Ponca	527.78	Farmers State
1905	Poole	325.29	State Bank of Poole
1907	Potter	679.52	Potter State
1886	Prague	949.61	Bank of Prague
1886	Prague	986.36	Farmers & Merchants
1905	Prairie Home	214.98	Farmers Bank

[fol. 8190]

1916	Princeton	313.92	Princeton State
1904	Prosser	293.68	Prosser State
1887	Ragan	740.04	Bank of Ragan
1917	Randolph	619.47	Farmers & Merchants Bank
1919	Ravenna	728.72	Security State
1886	Ravenna	1262.65	State Bank of
1900	Raymond	374.30	Bank of Raymond
1892	Red Cloud	1411.25	State Bank of
1903	Republican City	500.17	Commercial State
1908	Richland	623.61	Richland State
1904	Rising City	1054.56	Farmers State
1882	Rising City		Rising City Bank Consolidated with Farmers State Bank, Jan. 2, 1929
1907	Riverdale	605.87	State Bank of
1899	Riverton	626.04	Riverton State
1919	Rockville	384.36	Farmers State
1905	Rockville	628.29	Rockville State
1904	Rogers	405.20	Bank of Rogers
1908	Rosalie	412.09	Rosalie State
1904	Roseland	633.72	Roseland State
1891	Rulo	373.39	Bank of Rulo
1908	Rushville	1195.71	Union Bank—1195.71
1884	Salem	354.54	Bank of Salem
1917	Sarben	242.02	Sarben State
1917	Sargent	1482.72	Farmers State
1883	Sargent	719.81	Sargent State
1891	Saronville	319.71	Farmers State
1887	Schuyler	3630.22	Banking House of Folda
1902	Scotia	1156.57	Bank of Scotia

[fol. 8191]

1915	Scottsbluff	1717.26	Platte Valley State
1918	Scribner	1356.88	Farmers State
1872	Seward	1278.15	State Bank of Nebr.
1909	Shelby	924.45	Shelby State
1908	Shubert	391.84	Citizens Bank
1895	Shubert	595.71	Farmers State
1925	Sidney	2497.48	American Bank of
1919	Sidney	1890.35	Liberty State Bank
1913	Silver Creek	532.39	Farmers State Bank

EXHIBIT No. 53—Continued

Year chartered	Place of business	1/4 of 1%	Name of bank
1905	Smithfield	315.74	Farmers State Bank
1907	Snyder	331.49	Farmers & Merchants
1920	South Sioux City	1037.37	Nebraska State
1901	Spalding	1542.59	Security State
1922	Spencer	781.98	Spencer State
1908	Springfield	907.32	American State
1900	Springview	433.11	Stockmans Bank
1916	St. Edward	653.96	First State
1910	St. Libory	466.56	St. Libory State
1888	St. Paul	1607.29	Citizens State
1879	St. Paul	1365.22	St. Paul State
1908	St. Mary	335.46	Citizens State
1890	Stamford	893.00	Stamford Bank
1913	Stanton	1025.15	Elkhorn Valley State
1915	Staplehurst	412.22	Farmers State
1909	Stapleton	716.87	Bank of Stapleton
1901	Stapleton	450.19	Farmers State
1901	Steele City	441.46	Farmers State
1888	Steinauer	728.15	Bank of Steinauer
1916	Stella	240.20	Farmers State
[fol. 819p]			
1886	Stella	605.63	The State Bank
1902	Sterling	851.80	First State
1917	Stoddard	118.55	Farmers State
1887	Stratton	1001.67	Commercial Banking Co.
1926	Stratton	299.07	State Bank of Stratton
1919	Stromsburg	559.43	Farmers State
1882	Stromsburg	1420.88	Stromsburg Bank
1924	Sunol	349.33	Farmers State
1900	Surprise	348.30	St. Bk. of Surprise
1912	Sutherland	380.10	American State
1910	Sutherland	606.45	Farmers State
1894	Swanton	333.83	Bank of Swanton
1907	Swedeburg	489.91	St. Bk. of Swedeburg
1883	Syracuse	589.20	Bank of Syracuse
1884	Table Rock	648.56	St. Bk. of Table Rock
1884	Talmage	1226.61	Bank of Talmage
1912	Talmage	330.54	Farmers State
1902	Tecumseh	747.50	Farmers State
1909	Tecumseh	882.49	First State
1892	Tecumseh	843.90	Tecumseh State
1892	Tekamah	710.80	Burt County State
1905	Tekamah	1288.15	Farmers State
1919	Thayer	298.63	Farmers State
1897	Tobias	745.52	Citizens State
1912	Tobias	336.68	Tobias State
1918	Trenton	554.60	Citizens State
1917	Trenton	866.00	State Bank of
1905	Trumbull	354.71	Farmers Exchange
[fol. 819q]			
1910	Tryon	260.03	Tryon State
1905	Uehling	678.34	Farmers State
1906	Uehling	716.45	Logan Valley Bank
1928	Ulysses	216.91	Ulysses State

EXHIBIT No. 53—Continued

Year chartered	Place of business	1/4 of 1%	Name of bank
1908	Union	674.28	Bank of Union
1908	University Place	1147.31	Citizens State
1907	Upland	596.88	Peoples Bank
1883	Utica	907.08	Merchants Bank
1915	Valentine	1381.33	Nebraska State
1915	Valley	603.21	Farmers State
1899	Valley	828.23	Valley State
1889	Valparaiso	1024.70	Oak Creek Valley Bank
1919	Venango	365.56	Farmers State
1909	Venango	376.20	Venango State
1902	Verdigre	1056.77	Knox County Bank
1911	Verdigre	897.61	Verdigre State
1890	Verdon	744.68	Verdon State
1901	Virginia	238.60	Citizens State
1904	Wabash	114.70	Farmers State
1893	Wahoo	1476.04	Citizens State
1909	Wahoo	827.69	Nebr. State Savings
1918	Wallace	520.79	Farmers State
1919	Walton	338.99	Walton State
1904	Washington	534.36	Washington State
1901	Waterbury	340.42	Waterbury State
1924	Waterloo	257.28	State Bank of
1880	Wauneta	1122.93	Wauneta Falls Bank
1925	Wausa	1153.48	Commercial State
1892	Wayne	3563.91	State Bank of Wayne
[fols. 819r-820a]			
1895	Weeping Water	701.07	Nebr. State Bank
1885	Western	717.08	Saline County Bank
1906	Weston	681.04	Farmers & Merchants
1886	Weston	1216.50	The Weston Bank
1889	West Point	2047.11	Nebraska State
1912	Whitman	340.67	First State
1883	Wilber	1583.04	Saline State
1916	Wilber	1278.02	Wilber State
1905	Wilcox	380.09	Exchange Bank
1917	Wilsonville	354.29	Home State
1898	Wilsonville	990.86	Wilsonville State
1922	Winside	1079.97	Citizens State
1892	Winside	1234.73	Merchants State
1906	Winslow	1400.18	Winslow State
1913	Wisner	1351.75	Wisner State
1886	Wood Lake	372.81	Wood Lake Bank
1920	Wood River	792.85	Farmers State
1910	Wymore	651.96	Farmers & Merchants
1906	Wynot	787.63	Farmers State
1905	York	2693.38	American State
1895	Yutan	699.06	Bank of Yutan
1887	Beaver Crossing	769.50	State Bank of
1886	Benkelman	656.47	Bank of Benkelman
1902	Bladen	276.58	The Exchange Bank
1917	Bladen	238.58	Service State
1905	Bladen	512.62	State Bank of
1925	Cowles	476.63	The Cowles State
1907	Palmer	776.56	Loup Valley State
1893	Red Cloud	892.40	Peoples Bank
1909	Red Cloud	603.28	Webster County
1906	Rosemont	311.53	Bank of Rosemont
1907	Gordon	1352.66	Gordon State

[fol. 821] Mr. Payson D. Marshall, called by the defendants on surrebuttal, having been previously sworn, testified as follows:

By Mr. Abbott:

3660 Q. Mr. Marshall, referring to the aggregate items that you produced here this morning and to the item, "Paper more than six months past due" aggregating $1,022,000, you may state whether, immediately following the examiners' reports the question of removing or adjusting that paper was taken up with the several banks.

Mr. Flansburg: Objected to as not proper surrebuttal.
The Court: Overruled.

Exception.

A. We later received reports as to their adjustment of such paper.

Mr. Flansburg: Move to strike out the answer as not responsive.
The Court: Sustained.

Exception.

Mr. Abbott: Answer "yes" or "no".

A. Yes.
3661 Q. You may explain to the court the nature of that class of paper.

Mr. Flansburg: Objected to as having been gone all over on the cross examination of this witness.
The Court: He may answer.

Exception.

A. That paper consists of notes which are six months [fol. 822] past due and demand paper, demand notes which are more than—have run more than twelve months from their date.
3662 Q. And can you state to the court your experience in the Department and as a banker the reasons why, the main reasons, why the paper exists in that condition?

Mr. Flansburg: Objected to as no foundation laid, not not proper surrebuttal.

The Court: Sustained.

Exception.

3663 Q. Mr. Marshall, from these examiners' reports and the data there contained with respect to this class of paper is there anything to indicate the value of it?

Mr. Flansburg: Objected to as no foundation laid, not proper surrebuttal and not the best evidence.

The Court: Overruled.

Exception.

A. No.

3664 Q. You may state from your experience as a banker and from your contact with the Banking Department whether the permitting of paper to become past due in this regard is a common practice with bankers to force the payment by the bad debtor, of the paper?

Mr. Flansburg: Objected to as calling for the conclusion of the witness, no foundation laid and not proper surrebuttal.

The Court: Objection sustained.

Exception.

3665 Q. On the disclosure, Mr. Marshall, of this class of paper and the amount held by the respective banks and particularly with reference to these examiners' reports that [fol. 823] you testified to, you may state to what extent that paper has been disposed of by renewal or collection?

Mr. Flansburg: Objected to as no foundation laid, no showing this witness has examined his records, calling for pure speculation on his part.

The Court: Objection sustained.

Exception.

3666 Q. Mr. Marshall, from your contact with the Department as chief examiner are you able to state approximately the present situation with reference to this particular class of paper?

Mr. Flansburg: We make the same objection, no foundation laid.

The Court: Objection sustained. You ought to make a showing of how much he has studied the matter.

Exception.

3667 Q. Mr. Marshall, what are your duties in the Department and have they been for the last two years with respect to these examiners' reports?

A. Largely correspondence relating to the recommendations of the examiners pertaining to their various examinations of the banks.

3668 Q. Now as to the paper under discussion: have you following the receipt of these reports by the examiners taken up that particular paper with the banks in which it was listed?

Mr. Flansburg: Objected to as repetition.

The Court: Sustained.

Exception.

3669 Q. Do you know, Mr. Marshall, from your corres- [fol. 824] pondence with the bank and otherwise from the data of your Department to what extent the banks carrying this particular $1,022,000 of paper took action upon it, approximately?

The Court: He may answer "yes" or "no."

A. No.

3670 Q. Do you know with respect to a part of it?

A. Yes.

3671 Q. You may state your information in that regard.

Mr. Flansburg: Objected to as no foundation laid and no showing he has a record here to exhibit to us and from which we could cross examine.

The Court: Objection sustained.

Exception.

3672 Q. Were you familiar with these reports of the examiners as they came in?

Mr. Flansburg: Objected to as repetition.

The Court: Sustained.

Exception.

3673 Q. And with the amount listed by these particular banks and respective banks?

Mr. Flansburg. Objected to as repetition, it has been gone over fully.

Exception.

A. Yes.

3674 Q. And do you know generally what banks have complied with your request as to renewing or collecting this class of paper?

Mr. Flansburg: Objected to as having been repeatedly asked and been answered.

[fol. 825] The Court: He may answer.

Exception.

A. Yes.

3675 Q. Now you may state your knowledge in that respect.

Mr. Flansburg: Object as no foundation laid, nothing showing he has any data he will furnish from which we could cross examine.

The Court: Sustained.

Exception.

3676 Q. Do you have in your department reports from the banks with reference to the disposition made of this paper?

A. Yes.

3677 Q. And have you examined those reports, that is, have they come under your observation?

A. Most of them.

3678 Q. Now, are you able, from the information that you gained from those reports, to give information here as to the disposition by certain banks of their proportion of the paper listed in this aggregate?

Mr. Flansburg: Objected to as no foundation laid, no reports being in evidence here.

The Court: Sustained.

Exception.

3679 Q. Have your received from these banks, Mr. Marshall, in your Department, statements and letters as to the disposition made of the items that constitute this million dollars?

Mr. Flansburg: Objected to as repetition.
The Court: He may answer.

Exception.

A. Yes, upon a part of them.
[fol. 826] 3680 Q. From a part of them. Now, you are familiar with those reports, are you?
A. With most of them.
3681 Q. That is, as to the part you refer to?
A. Yes.
3682 Q. And do those letters and communications from the banks indicate the disposition that they have made of these particular items, to the extent you have examined them?
A. Yes.
3683 Q. Are you able to state, Mr. Marshall, from the information gleaned from those reports the disposition made of the part of the items constituting this amount?
A. Yes.
3684 Q. And approximately the extent of the items thus disposed of?
A. Yes.
3685 Q. You may state your information in that regard.

Mr. Flansburg: Objected to as no foundation laid, no data here, no record which we can examine.
The Court: Sustained.

Exception.

3686 Q. Is the data available in your Department as to such of this paper as has been either removed or collected following the examiners' reports?

Mr. Flansburg: We object to recalling this witness and keeping this case open.

3687 Q. I will ask this further question: These exami-
[fol. 827] ners' reports, as I understand it, have been received from time to time for a year past?
A. Yes.

3688 Q. And it is those examiners' reports received from time to time for a year past from which the aggregates you testified to were made?

Mr. Flansburg: Objected to as not proper surrebuttal and having been gone over.

Mr. Abbott: I withdraw the question.

3689 Q. Now at the time that each of these examiners' reports is received through the year was there taken up in your Department the particular item as contained in the reports then received with respect to this class of paper and communication had with the bank with reference to it?

A. This class of past due paper?

3690 Q. Yes.

A. This classification of past due paper was taken from the quarterly reports made by the banks themselves and not by the examiners.

3691 Q. Now, following the receipt of those quarterly reports did the Department make demand on each of the banks to take care of that particular type of paper?

A. We do most of that through our examiners' reports.

Mr. Flansburg: Move to strike out the answer as not responsive.

The Court: Overruled.

Exception.

3692 Q. Mr. Marshall, what is the custom and experience of your Department as to whether or not this past due [fol. 828] paper reported in the call reports is uniformly removed or renewed, collected, prior to the periodical examination by the examiners?

Mr. Flansburg: Objected to as not susceptible to cross examination, no foundation laid and speculative as refers to this witness.

The Court: Sustained.

Exception.

3693 Q. Now, referring to the item of $1,100,000 which the examiners estimate to be worthless you may state whether, as contained in the examiners' reports, there is any action on the part of the banks with reference to con-

ceding the worthlessness of that paper or whether that is the examiner's own estimate of it, independent of any opinion of the banker?

Mr. Flansburg: Objected to as not proper surrebuttal and no foundation laid.

The Court: Sustained.

Exception.

3694 Q. Following the receipt of these examiners' reports from which this paper is listed, have you had correspondence with, and personal interviews, with the banks and bankers affected with respect to it?

Mr. Flansburg: Objected to as repetition.

The Court: Overruled.

Exception.

A. Yes.

3695 Q. I will ask you whether or not, as to the considerable part of it, controversy exists as between your Department and the banks as to its value and the classification given it?

[fol. 829] Mr. Flansburg: Objected to as calling for the conclusion of the witness, not proper surrebuttal and no foundation laid.

The Court: Sustained.

Exception.

3696 Q. Have you examined the records of your office and are you familiar with the correspondence with respect to the paper included in this classification, as between your office and the banks affected?

Mr. Flansburg: Objected to as repetition.

The Court: He may answer.

Exception.

A. Yes.

3697 Q. And following the receipt of these examiners' reports have you had personal interviews with the bankers whose paper had this classification or with any of them?

A. Yes.

3698 Q. Are you able to state from your information and the interviews had by you with the bankers and from your correspondence with them, whether or not certain of the banks excepted to and resisted the classification of this paper as worthless?

Mr. Flansburg: Objected to as not proper surrebuttal, no/ proper foundation laid, and immaterial.

The Court: Sustained.

Exception.

3699 Q. Mr. Marshall, you may make a further examination of the records of your office with respect to the worthless paper and the probable loss on other paper and I will call you for further examination. Have you made a com- [fol. 830] pilation from the examiners' reports, at the request of the plaintiff here, of the losses on real estate?

Mr. Flansburg: Objected to as incompetent, irrelevant and immaterial and not proper surrebuttal.

Mr. Abbott: Withdraw the question.

3700 Q. Taking the reports of the banks themselves as classified and set out by you in Exhibit 37, do those banks have some assets that would not be disclosed in the reports as thus made?

Mr. Flansburg: Objected to as not proper surrebuttal, we asked nothing about Exhibit 37 or other assets. And the further objection no foundation laid.

The Court: Sustained.

Exception.

Witness excused.

Recess.

[fol. 831] Mr. Albert L. Schantz, called as a witness in rebuttal by the plaintiffs, having been previously sworn, testified as follows:

By Mr. Gaines:

3701 Q. How long have you been actively engaged in the banking business?

A. Since November, 1912.

3702 Q. To what extent have you given your time to that business?

A. All my time.

3703 Q. With what bank have you been associated?

A. I am president of the State Bank of Omaha.

3704 Q. And its active executive officer during all that time?

A. Yes, sir.

3705 Q. Mr. Schantz, if you can tell, how many, approximately, of the state banks of Nebraska do business with that bank?

A. About one hundred and fifty.

3706 Q. And then, have you had business relations with others besides the one hundred and fifty?

A. Yes, sir.

3707 Q. In your business relations with the state banks, of what does that consist?

A. They carry accounts with us and some borrow money from us.

3708 Q. Does that require you to familiarize yourself with their financial status at the time loans are made?

A. Yes, sir.

3709 Q. Now, Mr. Schantz, what position have you held with respect to banking, other than being president of the State Bank of Omaha?

[fol. 832] A. I am a member of the Economic Policy Commission of the American Banking Association.

3710 Q. How many members on that?

A. Ten.

3711 Q. Name some of them.

A. Mr. McLucas, Commerce Trust Company, Kansas City, Chairman of the Board. Paul Warburg——

3712 Q. His position?

A. National financier and President of the Acceptance Corporation of New York City, Mr. Ayres, vice-president of the Cleveland Trust Company, considered the greatest economist in America.

3713 Q. Is Mr. Roberts a member?

A. Mr. G. E. Roberts, vice-president of the National City Banks——

3714 Q. And the names and description of the others?

A. Who is one of the greatest economists in America, Mr. Wolfe, vice President, Philadelphia Trust Company, Robert Hecht, President of the Hibernia Trust Company of New Orleans.

3715 Q. Now, in addition to your duties with your own bank, do you subscribe for and read the various journals and papers connected with banking?

A. Yes, sir.

3716 Q. This committee you speak about, do they have meetings at any time?

A. We have about four meetings a year and prepare [fol. 833] ourselves for those meetings by making studies of the matters coming up. They relate to the analysis of banks, chain systems, holding companies and any other matters of importance that come before the American Bankers Association.

3717 Q. Now, based upon your experience in your own bank and your knowledge of the conditions of the state banks of Nebraska and the result of your studies of the situation, have you an opinion and can you give an estimate, fairly accurate, of the percentage of losses of banks with respect to two items, their gross earnings and their deposits? You can answer that "Yes" or "no".

A. Yes.

3718 Q. Take based first upon the amount of deposits alone, what is the average loss or approximate average loss per year that arises as based upon the amount of deposits in the bank?

Mr. Ferneau: I object to that as no foundation laid, witness has not shown himself qualified to testify, and as incompetent, irrelevant and immaterial.

Mr. Campbell: Same objection; Intervenors object further on the ground it is not restricted to the State of Nebraska and to the matters in issue here.

The Court: Overruled.

Exception.

A. The Federal Reserve District of Kansas City, in which Omaha and Nebraska are located, the loss based on deposits show one and fifty-two hundredths per cent.

3719 Q. Loss based on loans and investments show loss?

A. Loss two and fifteen hundredths per cent.

3720 Q. Loss based on gross earnings?

[fol. 834] A. Shows sixteen and eight hundredths per cent.

3721 Q. And for what period of time have you computed it?

A. From June 30, 1924 to June 30, 1928.

3722 Q. Now, Mr. Schantz, from your experience in banking and from your studies are you able to state whether the loss from loans, as to whether or not the loss from loans is greater than from investments, such as bonds?

A. The loss from loans is greater than from investments, such as bonds.

Mr. Ferneau: Move to strike the answer as not proper rebuttal, not confined to the controversy here and not confined to the banks of Nebraska.

Mr. Campbell: The Intervenors join in the motion.

The Court: Overruled.

Exception.

3723 Q. In your bank in Omaha do you carry both classes of securities?

Mr. Ferneau: Object to that as not rebuttal and incompetent and immaterial.

The Court: Overruled.

Exception.

A. Yes.

3724 Q. To what extent are you carrying bonds and that character of investments as compared with loans?

Mr. Ferneau: Objected to as immaterial, and not proper rebuttal.

The Court: Overruled.

Exception.

A. About $2,100,000 in investments; about $3,200,000 in [fol. 835] loans and discounts.

3725 Q. How will the loss from what you term investments compare with the loss from loans?

Mr. Ferneau: Objected to as immaterial.
The Court: Overruled.

Exception.

A. We have no losses on bonds and our losses have been on our loans and discounts.

3726 Q. And is that generally true, the losses on loans are much greater than on bonds?

A. Yes, sir.

3727 Q. Do you know, from your acquaintance with the banking conditions in Nebraska, whether the banks in small towns carry investments as compared to loans?

A. The last two years some of the better banks, who were able to, have bought bonds and are beginning to bring up their bond account.

3728 Q. How about the majority of state banks?

A. The majority have no money to buy bonds, their money is tied up in loans and "other real estate".

3729 Q. Now, based upon profits, what would you have to say?

Mr. Ferneau: Objected to as not proper sur-rebuttal.
The Court: Overruled.

Exception.

A. The net profits, based on gross earnings, for 1924, show 5.02% for 1926, 9.07% and for 1927, 10.04%.

3730 Q. The 1928 figures haven't been made?

A. No, sir.

3731 Q. And the paper you handed me is a Federal Reserve Bulletin?

[fol. 836] A. Yes, sir.

3732 Q. Is that sent out to banks generally?

A. Yes, sir.

Mr. Gaines: In connection with his examination I have here a publication by the United States Printing Office, issued by the Federal Reserve Board at Washington and from page 827 I offer in evidence, from the December, 1928, issue, I offer the following: "The summary for the fiscal year, 1928.—Member banks earned net profits——" (interrupted).

Mr. Ferneau: Objected as irrelevant, incompetent, and immaterial, not properly identified and not proper rebuttal.

The Court: Overruled.

Exception.

Mr. Ferneau: We further object that this doesn't refer to conditions in this state, is not confined to conditions here but the conditions of all the United States.

Mr. Campbell: Intervenors make the same objection and insist that none of this is material.

The Court: Overruled.

Exception.

Mr. Gaines (continuing): "of $470,000,000 during the year ending June 30, 1928, an increase of about $30,000,000 over the preceding fiscal year. The banks' capital funds, at $5,362,000,000 in 1928, were $360,000,000 larger than in 1927, and the increased profits constituted about the same [fol. 837] rate of return on capital funds in 1928 (8.77 per cent) as was earned in 1927."

3733 Q. Now, Mr. Schantz, what is the meaning in banking terms of the term "capital funds"?

A. That is the invested funds, including capital and surplus.

3734 Q. Mr. Schantz, in your opinion, what will be the effect, upon the state banks of Nebraska, of the payment of what is known as the special assessment and its continuance for a number of years?

Mr. Ferneau: Objected to as incompetent, irrelevant and immaterial, not rebuttal, no proper foundation laid, no qualification shown, calling for a mere conclusion and speculation of the witness.

Mr. Campbell: Intervenors join in the objection and specifically object it is immaterial in this case what becomes of the state banks in Nebraska.

The Court: Overruled.

Exception.

A. The large banks and all good banks will nationalize; all who can will nationalize and the balance will go out of business.

Mr. Ferneau: Move to strike out the answer as a mere speculation and no qualification shown to say what all of the banks will do.

The Court: Overruled.

Exception.

3735 Q. What, in your opinion, will be the effect of the continuance of the special assessment upon a large num- [fol. 838] ber, a majority, of the banks as to impairment of the capital of the present going state banks in Nebraska?

Mr. Fernau: Objected to as incompetent, irrelevant and immaterial, no foundation laid, not proper rebuttal, the witness is not qualified to answer, the witness has not shown sufficient knowledge to testify.

Mr. Campbell: Intervenors make the same objection and particularly as to its materiality.

The Court: Overruled.

Exception.

A. I think four hundred banks will be operating with impaired capital.

Mr. Ferneau: I move to strike the answer for the same reasons as given in the objection.

The Court: Overruled.

Exception.

3736 Q. Mr. Schantz, have you the comptroller's report, the comptroller of the currency of the United States' report for 1928?

A. Yes.

3737 Q. Have you made an investigation and an accounting of the money deposited in the national banks of Nebraska, based upon that report?

A. Yes, sir.

3738 Q. Give the statement and the date to which it is made and banks in the cities as compared with the banks outside.

Mr. Ferneau: Objected to as immaterial and not proper rebuttal.

The Court: Overruled.

Exception.

[fol. 839] A. At the close of business, October 23, 1928, that was the official comptroller's report,—(interrupted).

By Mr. Ferneau:

3739 Q. Do you have that report with you?
A. This is taken from it.

Mr. Ferneau: Object to this testimony unless the report is here for our investigation.
The Court: I will overrule the objection.

Exception.

A. At the close of business, October 3, 1928, it shows in the State of Nebraska, one hundred fifty-nine banks reporting, out state banks one hundred forty-eight. It shows deposits of $87,351,000. Lincoln, four banks reporting $25,410,000; Omaha, seven banks reporting, $102,880,000, making a total in the State of Nebraska in one hundred fifty-five national banks, total deposit of $215,641,000.

3740 Q. Now, can you state approximately, the same period, the amount of deposits in the state banks in Omaha?

Mr. Ferneau: Objected to as immaterial, not proper rebuttal, no foundation laid.
The Court: Overruled.

Exception.

A. At the close of business September 20th, that is the time the state made their call, 1928, 739 banks reporting.

3741 Q. I asked for Omaha; approximately how much were the deposits in the state banks of Omaha?
A. About twelve million.

[fol. 840] 3742 Q. A paper has been introduced in evidence here, Exhibit 50, purporting to be a letter from the Fremont State Bank, signed by Dan V. Stephens, President, or a publication in the Fremont Tribune. Will you state whether you have ever seen that before?
A. No, sir.

3743 Q. Did you have anything to do with the preparation of that article?
A. No, sir, I did not.

3744 Q. You are not a subscriber for the Fremont Tribune?

A. No, sir.

3745 Q. Now, Mr. Schantz, one other matter in connection with your former testimony. You spoke about having purchased some receivers' certificates. Have you made an investigation as to that?

A. Yes, sir.

3746 Q. Just state the correction or whatever it is.

A. I purchased $50,000 worth of receivers' certificates that were dated April 18th and registered April 21st.

3747 Q. Of what year?

A. 1927. They were sent to me in July of the same year and I paid $50,000 principal and the interest from the time of registration to the time I received them.

3748 Q. Were those the last receivers' certificates that you purchased?

A. Yes.

3749 Q. Your attention has been called to a series of publications in the Omaha Bee in 1926. You remember the [fol. 841] newspaper articles?

A. Yes, sir.

3750 Q. State what part, if any, you took towards giving the information contained in those articles?

A. I gave none of the information.

3751 Q. Did you have anything to do with the preparation of those articles?

A. No, sir.

3752 Q. You knew of their publication?

A. Yes, but I was not very much in sympathy from the beginning; in fact, objected from the first.

Mr. Campbell: Intervenors move to st-ike the answer from the word "yes".

Mr. Ferneau: Defendants join in the same objection.

The Court: Sustained.

Exception.

3753 Q. Did you have anything to do with originating the plan?

A. No, sir.

3754 Q. Were you informed as to who was to give the data for the publication of those articles, before their publication?

A. Yes, sir.

3755 Q. Who?

A. The Secretary of the Department of Trade and Commerce, Mr. Kirk Griggs, and the Secretary of the Guaranty Fund Commission, Mr. Van Peterson.

3756 Q. Mr. Schantz, you have given an opinion, based upon your investigation of the Federal Reserve District, of a charge off every year for losses. Now state in your opin- [fol. 842] ion what would be the reasonable charge off or the necessary charge off for the state banks, confined to Nebraska, based upon their deposits?

Mr. Ferneau: Objected to as irrelevant, incompetent and immaterial, no foundation laid, no qualification shown and not rebuttal.

The Court: Overruled.

Exception.

A. One and one-half per cent.

Mr. Gaines: You may cross examine.

Cross-examination.

By Mr. Ferneau:

3757 Q. Mr. Schantz, what is included in charge offs?

A. Oh, bad notes, all sales of real estate, if it should happen to be sold at a loss, any judgment or any thing your examiner tells you to take out.

3758 Q. Have you examined the Federal Reserve Bulletin for December, 1928?

A. No, sir.

3759 Q. The Federal Reserve Banking System is composed of national banks and state banks as well?

A. There are not many state banks in the Federal Reserve District of Kansas City. We have trust companies who operate under state charters.

3760 Q. Your bank is a member of the Federal Reserve System?

A. No, sir.

3761 Q. Do you know how many Nebraska Banks are [fol. 843] members of the Federal Reserve System?

A. Two.

3762 Q. And state banks in other states in the Kansas City District?

A. I don't know.

3763 Q. You don't know anything about that?

A. No, sir.

3764 Q. I will ask you, Mr. Schantz, if the loss on loans, per one hundred dollars of loans, for the years ending June 30, 1927, and 1928, in the Kansas City District, for state member banks wasn't .38%? I am reading from page 877 of the December, 1928, Bulletin.

A. That is what page 877 shows.

3765 Q. And page 877 shows it correctly?

A. I would think so.

3766 Q. Now, the figure you have given was taken from 1924 to when?

A. June 30, 1924 to June 30, 1928.

3767 Q. Yes. Now your figures don't correspond with these, do they?

A. Yes, they do, if you average it over a period of years.

3768 Q. The figures you gave were averaged from 1924 to 1928?

A. Exactly what I said.

3769 Q. You estimate conditions have improved greatly since 1924?

A. Yes, sir.

3770 Q. I am speaking about state banks?

A. State banks, I don't think, have taken their loss.

Mr. Ferneau: Move to strike the answer as not responsive.

The Court: Sustained.

Exception.

[fol. 844] 3771 Q. What I want to know, Mr. Schantz, is about state banks. The reports of the Federal Reserve banks show there was a great improvement in charge offs from 1924 to 1928.

A. Are you speaking of Nebraska now?

3772 Q. I am speaking of the field you covered in your direct examination.

A. Yes, sir.

3773 Q. How much of an improvement was there?

A. The figures will show.

3774 Q. You tell me.

A. I will have to refer to the report.

3775 Q. Take your report and tell me how much improvement there was.

A. Page 877—you want loss for one hundred dollars of loans?—shows .38%.

3776 Q. Now, what was the figure you gave in comparison?

A. I made no figures on state banks alone.

3777 Q. Can you make figures?

A. I might, if I had time.

3778 Q. Do that for me.

A. I might do it some day.

3779 Q. Do it today.

A. I can't give it for that.

3780 Q. You mean you can't take these figures—you testified as an expert—from these tables and figures—you said you were a member of this board and you mean to tell me you can't separate the loss on loans of state banks from the national banks of the Federal Reserve System for the period?

[fol. 845] A. I can do so if you give me time. I can't do it immediately.

3781 Q. How long will it take you to do it?

A. It might take me several hours.

3782 Q. I would like to have you make that computation.

A. All right.

3783 Q. You testified you didn't separate the state banks from the national banks in the figures you gave?

A. I included all the banks in the Kansas City Federal Reserve District.

3784 Q. That means national and state banks and trust companies?

A. National and state banks and trust companies.

3785 Q. Let's take it on that theory. You may take your bulletin that you testified from and turn to page 877. I will ask you if that bulletin doesn't show that for the years ending June 30, 1927 and 1928 that the loss on loans, per

one hundred dollars of loans for all member banks was .52%?

A. The loss on loans, per one hundred dollars of loans, this is based on loans.

3786 Q. What did you give on your direct examination?

A. I gave, *on* the period examined, June 30, 1924 to June 30, 1928, loss based on loans and investments, 2.15%.

3787 Q. Now, then, let's take it—what was it for 1924 on all member banks of the Federal Reserve District, what was the percentage on loans, on one hundred dollars of loans?

A. For 1924 you want it?

3788 Q. Yes.

A. I can't give it on the loans. I can give it on the vol- [fol. 846] ume of losses.

3789 Q. I want the loss per one hundred dollars of loans.

A. I can't give it to you on one hundred dollars of loans.

3790 Q. You testified to it, didn't you?

A. No.

3791 Q. You said it was an average?

A. It was an average.

3792 Q. Where are the figures from which you got your average?

A. I left them at home; this is an analysis of my work sheets.

3793 Q. Can you give me the figures on 1925?

A. I can't give you any figures without my work sheets.

3794 Q. How much of a decrease was there from 1924 to 1928?

A. The decrease showed the latter part of 1927 and 1928.

3795 Q. How much was there?

A. Considerable.

3796 Q. How much?

A. I can't answer that.

3797 Q. You haven't got any figures here to answer my question?

A. I can't answer you from this report.

3798 Q. You mean to tell me you are not able to separate it?

A. I got my information from the Comptroller's reports I have at home.

3799 Q. Have you any here?

A. No, sir.

3800 Q. You haven't any information here to show how you arrived at this average?

A. Why, some.

[fol. 847] 3801 Q. What was the information from the Comptroller's report?

A. I haven't got it here except as given over a period of years.

3802 Q. Have you got any figures to show us how you averaged it up?

A. Yes, I have at home.

3803 Q. Everything is at home except this sheet that you have drawn your conclusion from?

A. It isn't a conclusion, it's an answer.

3804 Q. It is based on the report?

A. It is based on the reports over a period of years and averaged.

3805 Q. And you have none of those with you?

A. No, sir.

3806 Q. For the period ending June 30, 1928, as shown by this book you testified from in your direct examination—I wish you would turn again to page 877. That shows the loss on loans per one hundred dollars of loans for national member banks to be .63%, doesn't it?

A. Yes, sir.

3807 Q. And for the same period it shows loss on loans per one hundred dollars of loans, for state member banks to be .38%?

A. Yes, sir.

3808 Q. Now, you testified, did you, as to the percentage of loss on investments, invested capital?

A. Yes, sir.

3809 Q. Take that sheet that you have—before I get to that, how did you arrive at your percentage of loss on in-

[fol. 848] vestments or on invested capital?

A. Read it from the book here.

3810 Q. You testified to it, you testified to three different classifications.

A. Oh, that is what you are getting at.

3811 Q. How did you arrive at your percentage of losses on investments?

A. I did not testify to loss on investments.

3812 Q. How much less were they than on loans as shown by this that you testified to? How much was the loss?

A. I testified that our loss on our bond accounts were nothing and our loss came through loans.

3813 Q. How much were your losses?

A. Based on what?

3814 Q. Based on your loans?

A. Loss based on loans or deposits or gross profits?

3815 Q. I am asking you about loans.

A. What year?

3816 Q. 1927.

A. About one and three-fourths per cent.

3817 Q. What was it for 1928?

A. I will have to work that up, the loss on loans? (figuring)

3818 Q. Yes, sir, that is what I am asking you about now.

A. About two and one-fourth per cent.

3819 Q. Now how much was it on your gross earnings for 1927 and 1928?

A. You want them separately?

[fol. 849] 3820 Q. Yes, sir.

A. In 1928, about twenty-four per cent. About twenty-one per cent in 1927.

3821 Q. Now, you testified that the percentage of loss on gross earnings as shown by the Federal Reserve report was sixteen and eight-tenths per cent, as I understood you.

A. The average is sixteen and eight-hundredths per cent from June 30, 1924 to June 30, 1928.

3822 Q. What was it in 1928?

A. We haven't separated our figures.

3823 Q. There was a large decrease, wasn't there, from 1924 to 1928?

A. It has been going down.

3824 Q. And 1928 was the lowest period from 1924 down?

A. Yes.

3825 Q. And you don't have any figures to show what it was in 1928?

A. No, sir.

Mr. Gaines: I propose to show by an official bulletin on the Nebraska National Banks for the year that you ask and

3826 Q. This compilation you get includes national and state banks?

A. It includes all member banks of the Kansas City District.

3827 Q. There has been a large decrease in the percentage of loss on loans and gross earnings and deposits and investments since 1924, hasn't there?

A. Yes, sir, in the Federal Reserve District.

3828 Q. Now, can you tell the court how marked that decrease has been?

[fol. 850] A. Not without having figures, I haven't separated my years.

3829 Q. It was the largest on all those items in 1924, wasn't it?

A. No, it wasn't.

3830 Q. What effect did the deflation period or the deflation we went through have to do with the percentage of loss?

A. Considerable.

3831 Q. How much?

A. I couldn't answer that in percentages.

3832 Q. When did the deflation begin to show seriously in losses to banks?

A. In 1921.

3833 Q. And continued for what period?

A. I don't think it is through yet?

3834 Q. It began to hurt banks in 1921?

A. Yes.

3835 Q. Has it lessened in any degree?

A. The good banks have taken out their losses and the others couldn't take them out so they still have them to charge out.

3836 Q. Where they couldn't take them out they still have them to charge out. Mr. Schantz, did you get your data from this Federal Reserve Bulletin or from some other bulletin?

A. I got it from the Comptroller's report, at home.

3837 Q. You didn't use this for any of your compilations?

A. No, sir.

Mr. Ferneau: I desire at this time to move to strike out the testimony of the witness for the reason it is testimony

[fol. 851] from a memorandum which he says was made from a Comptroller's report. He don't have the report here and we are entitled to that to cross examine.

The Court: I think it is on the plaintiff to produce it here.

Exception.

3838 Q. A report for what year is that, Mr. Schantz?

A. It covered reports from June 30, 1924 to June 30, 1928.

3839 Q. Is that one book or several books?

A. No, several.

3840 Q. How many?

A. Probably a dozen or fifteen.

Mr. Fernean: We should be able to get these books and we should like to have them.

The Court: It is on the plaintiff or the witness to produce these reports, there isn't any question about that.

Mr. Abbott: No sir, that is the law.

The Court: The motion to strike out is overruled.

Exception.

3841 Q. Was there any other data that you used, except the comptroller's reports for the years indicated, to make your compilation?

A. No, sir.

3842 Q. That was the only books you used?

A. That and the analysis brought out by Mr. Stronck and Company of Chicago who make a business of analyzing the comptroller's reports and of analyses pertaining to banks.

3843 Q. Do you have that here?

[fol. 852] A. Yes, sir.

3844 Q. We would like to have access to that too, so we can use it with the other to prepare for cross-examination. Now, Mr. Schantz, if I understand you, you said you had nothing to do with the article in Exhibit 50?

A. Yes, sir.

3845 Q. That was entirely Mr. Stephens' own doings?

A. I had nothing to do with it, never saw it before.

3846 Q. Did you prepare any statements concerning this Guaranty Law and send them out over the name of your bank?

A. No, sir.

3847 Q. You never did?

A. I prepared no statements.

3848 Q. Who prepared the statement that you did send out?

A. I sent out one statement prepared by Mr. Stephens and published at Fremont.

Mr. Gaines: Objected to as we made no examination along that line.

The Court: Sustained.

Exception.

3849 Q. Now, Mr. Selhantz, referring to these advertisements: your attention was directed to Exhibit 13 which consists of a series of advertisements in the Omaha Bee; you bank signed those advertisements, didn't it?

A. No, sir.

3850 Q. Isn't the name of your bank attached to those advertisements?

A. Not with our authority.

3851 Q. You mean to say someone signed those without your authority?

A. I understand our name appeared to one of those and [fol. 853] it is not with our authority.

3852 Q. It is the last one of the series that the name of your bank appears on?

A. Yes.

3853 Q. And you mean to say it was put there without your authority?

A. Yes.

3854 Q. Who put it on?

A. The newspaper.

3855 Q. Who paid for it?

A. I paid my share, I donated it.

3856 Q. You paid your share for the Twenty-six or Twenty-seven advertisements that appeared in the Omaha Bee?

A. Yes, sir.

3857 Q. You have read the advertisements as they appeared in the Omaha Bee?

A. I did not.

3858 Q. You did not read them?

A. No, I was not interested in them, I was not in sympathy with them.

3859 Q. What were you paying the Omaha Bee for when you paid them for the advertising?

A. I made a donation and told them so at the time.

3860 Q. Who did you make a donation to?

A. Mr. Wilson, the advertising editor of the Bee.

3861 Q. He told you what he was going to do?

A. Yes, and I said I didn't sympathize with it, that it didn't meet with my approval and finally I said "If you are so insistent and the bankers want it I will just donate what-[fol. 854] ever our share is."

3862 Q. Yes, and you signed the contract for the advertisements before they were published in the paper?

A. Yes, sir.

3863 Q. You signed the contract before any of these advertisements were published in the paper, agreeing to pay the pro rata share?

A. I signed the contract, I don't remember whether it was before or after.

3864 Q. How much did you pay?

Mr. Gaines: Objected to as immaterial.

The Court: He may answer.

Exception.

A. Between five and six hundred dollars.

3865 Q. And you mean to testify that you didn't authorize your bank's name to be signed and didn't know it was to be put on there?

A. Yes, sir, I mean to say I didn't authorize it.

3866 Q. Were you present at those meetings at Fremont?

A. Yes, sir, at two different meetings.

3867 Q. That was before the publication?

A. That was the time the copy was submitted, with Mr. Griggs and Mr. Peterson.

3868 Q. And they were submitted to you?

A. I was sitting in the room; I heard the conversation.

3869 Q. You were there with Mr. Stephens?

A. I was there with a number of other bankers.

3870 Q. You mean to say——

A. I heard them discuss one or two of the advertisements [fol. 855] and Mr. Griggs cut out some things he didn't want in them.

3871 Q. Were you at more than one meeting?

A. I think I was at two meetings.

3872 Q. When they had these advertisements there under discussion?

A. That was part of the discussion.

3873 Q. The first time, how many did they have?

A. I couldn't answer that.

3874 Q. How many did they have the second time, in Fremont?

A. I don't know.

3875 Q. What did they read the second time at Fremont?

A. Whatever they had prepared or completed since the other meeting, read them as they had them prepared, and Mr. Wilson made a statement.

3876 Q. They told you they were going to advertise in the Omaha Bee?

A. Yes, sir.

3877 Q. That the banks were going to?

A. Yes, sir.

3878 Q. At that time did you make any statement to them telling them you didn't want your bank's name on there too?

A. No, sir, I didn't know it was to be on there.

3879 Q. What were you at Fremont for?

A. I told you to see the first two or three advertisements.

3880 Q. Didn't you ask them what they were going to do?

A. No, I wasn't running the advertising campaign.

3881 Q. What did you to Fremont for?

A. Because I was invited there.

3882 Q. Who were the bankers who were invited there, too?

A. I can't name all of them.

[fol. 856] 3883 Q. Can't you name any of them?

A. I can't tell who was there.

3884 Q. Was Mr. Dan Stephens there?

A. Yes, sir.

3885 Q. Was Mr. Seelenfreund there?

A. I don't remember, he may have been.

3886 Q. Can you tell anyone else who was there?

A. I said I didn't remember. I know Mr. Stephens was there. He seemed to be the host and served the lunch.

3887 Q. How many bankers were there?

A. I don't know.

3888 Q. Which one of these advertisements did they read to you?

A. The first two, possibly the first three.

3889 Q. Now what did you tell them?

A. I told them nothing. I had no remarks to make. I was not in sympathy with it and I wasn't there to criticise or approve.

3890 Q. Now, when you first learned your name had been on these advertisements, that is when did you first learn your name had been put on these advertisements?

Mr. Gaines: Object to the question because it contains the statement "on these advertisements". The statement was on the last one of this series of advertisements.

No ruling.

A. When my attention was called to it.

3891 Q. When was your attention called to it?

A. When the paper was issued.

[fol. 857] 3892 Q. Did you, at any time after you learned that your bank's name was on the last of the series of these advertisements up to the present time, repudiate anything that is in these advertisements?

A. No, sir.

3893 Q. Did you ever tell any of your depositors or your customers that there was anything in these advertisements that you disapproved of?

A. There was no good reason why I should. No, I didn't discuss the advertising with my customers.

3894 Q. Did you inquire of anyone when you discovered the name of your bank—who put it on and who was responsible for it?

A. No, sir.

3895 Q. You claim it was on there without your consent?

A. Yes, sir.

3896 Q. Didn't you naturally want to know who put it on there?

A. The newspaper put it on. It was too late then to take it off.

3897 Q. Do you know the newspaper put it on?

A. I suppose they did.

3898 Q. Will you tell me whether you signed the contract before your name was put on this advertisement or afterwards?

A. I signed the contract but I can't tell whether it was before this or afterwards. The date would show.

3899 Q. Was it before the advertisement appeared?

A. I can't remember that.

3900 Q. Have you got the contract?

A. No, sir.

[fol. 858] 3901 Q. What did you do with it?

A. We don't keep those contracts.

3902 Q. Have you got anything to show the date of that contract?

A. The Bee should have that.

3903 Q. You say Mr. Griggs, who was then head of the Department of Trade and Commerce, was at Fremont when these advertisements were discussed?

A. He was here when I was there.

3904 Q. Now the only thing Mr. Griggs was suggesting was that there be nothing put in these advertisements that would cause conflict between the state and national banks? Isn't that so?

Mr. Gaines: We object as no cross examination. I asked nothing about the conversations.

The Court: Sustained.

Exception.

3905 Q. Mr. Schantz, in this page which is the last of a series of advertisements in the Omaha Bee in which your bank's name appears as one of the banks, there appears this: "The men who told the story that no other state can tell are the men who control and operate the state banks in Nebraska. A group of these Nebraska state bankers felt that this story should be told to the people of the state and to the people of other states. They felt that such a record should be known to all, that there might come to Nebraska the benefits to which a strong financial foundation

rightfully entitled her. They raised the funds, they laid out the plans and directed the writing of the chapters in [fol. 859] this Nebraska story that has gripped the attention of the nation. The names of the banks which they control and operate are therefore here presented in bringing to a close the story that no other state can tell." You read that, didn't you, before it was put in the advertisement?

A. No, sir.

3906 Q. Didn't you read it when the advertisement was gone over?

A. When the advertisement appeared it was brought to my desk and I read it.

3907 Q. That was true?

A. I don't know.

3908 Q. You mean to tell me you don't know whether that story was true, that I have just read one of the chapters?

A. I don't know, it may have been true at that time.

3909 Q. You mean to tell me that part which said that the banks raised the funds, laid out the plans and directed the writing of the chapters in this Nebraska story is not true?

A. I mean to say that is not true.

3910 Q. How do you know that is not true?

A. Because I had nothing to do with it. I am answering for myself; you are asking me.

3911 Q. You had nothing to do with it except paying for it?

A. That is all.

3912 Q. Did Mr. Stephens talk to you about this?

A. No, sir.

3913 Q. Do you know how many banks' names were attached to that advertisement?

[fol. 860] A. I told you before I was not in sympathy with it, gave it no attention and simply made a donation and I told Mr. Wilson so.

3914 Q. You mean to say you didn't know what banks were interested in it?

A. No.

3915 Q. Of course, you knew Mr. Stephens' bank was interested in it?

A. Yes, sir.

3916 Q. And you don't know what is in those advertisements?

Mr. Gaines: Object to that as repetition.
The Court: I think he has answered that.

Exception.

3917 Q. Do you know what is in those advertisements and did you before you brought this law suit?
A. I never read those advertisements, just glanced through them generally.
3918 Q. Do you know whether it is true?
A. It may have been at the time.
3919 Q. You don't know whether it was true at the time or not?
A. I don't know; I had nothing to do with passing on those articles.

It now being four thirty o'clock p. m. the court took an adjournment until the following day, February 14, 1929, at ten o'clock a. m.

[fol. 861] Thursday, February 14, 1929, ten o'clock a. m., court convened pursuant to adjournment and the following proceedings were had and done:

Mr. Albert L. Schantz, having been previously sworn, resumed the stand for further cross examination.

By Mr. Ferneau:

3920 Q. Mr. Schantz, I want to ask you if you can name any other bankers that were at Fremont, except yourself and Mr. Stephens?
A. No, I don't recall anyone else but there were a number of them.
3921 Q. You don't recall any at all?
A. No.
3922 Q. How were those advertisements displayed to you there?
A. They were displayed one at a time by Mr. Wilson, I think.

3923 Q. How were they displayed?

A. I presume they were held up in front of us.

3924 Q. I want to know all about how it was done.

A. I gave it very little attention and I might have been out smoking a cigar.

3925 Q. Were you out in the lobby?

A. I might have been.

3926 Q. I will ask you again, how were the advertisements displayed to the bankers in that conference?

A. I can't answer, I don't know.

[fol. 862] 3927 Q. You testified yesterday that two of them were read to you, didn't you?

A. Two were read before the one meeting, as I explained, when I was there.

3928 Q. Didn't they place them on the wall and display them that way?

A. Not that I recall.

3929 Q. You don't recall that?

A. No.

3930 Q. You signed a letter, didn't you, agreeing to these advertisements?

A. I don't remember.

3931 Q. Don't you know you did?

A. I do not.

3932 Q. There was such a letter signed and sent out to these bankers telling them you had agreed to these advertisements?

A. I don't know, I don't recall any.

3933 Q. Will you say you didn't sign such a letter?

A. No, sir, I will not.

3934 Q. If you did, when did you sign it?

A. I told you I don't remember signing such a letter.

3935 Q. You say that these advertisements, as I understood you, were prepared by Mr. Griggs?

A. The advertisements,—if I made any statement I would say they were prepared by Dunn and Wilson of the Bee newspaper and submittted to Mr. Griggs and Van Peterson for approval and censure.

3936 Q. And what did you bankers have to do with it?

A. Nothing but pay our part.

[fol. 863] 3937 Q. Now, getting back to your testimony concerning the per cent of gross earnings, have you got

the Comptroller's report you took this from with you?

A. Just a minute.

3938 Q. Now, you testified yesterday you took those from the Comptroller's report and from that alone.

A. No, sir.

3939 Q. Now you testified you figured these out from the comptroller's reports, didn't you?

A. I testified I got these from Stronks' reports, who get them from the Comptroller of the Currency, they are compiled by them and that is what we bankers rely on.

Mr. Ferneau: I move to strike out the witness' testimony of figures received from compilations of private firms as not official public reports and hearsay and not the best evidence. He testified he took these from the Comptroller's reports which were supposed to be a public document. There is no one here to testify to the truthfulness of these compilations and for the further reason I move to strike out all his testimony concerning profits because it now appears he claims to have made the figures from this compilation rather than from these reports.

By Mr. Haines:

3940 Q. Mr. Schantz, the paper I hand you, which has been marked Exhibit 56, purports to be prepared by H. M. Stronk Company and prepared from the Comptroller's re-
[fol. 864] ports. Is that paper one that is sent to bankers?

A. This paper is sent to bankers.

3941 Q. Is it recognized or accepted by bankers as an authority covering the statements of what it contains?

Mr. Ferneau: Objected to as no foundation shown and Exhibit shows it is made by a private concern; there is nothing to show it is correctly compiled.

The Court: Overruled.

Exception.

A. Yes.

3942 Q. How long have these diagrams, similar to this been published?

Since 1921.

3943 Q. You have received them at your bank since that time?

A. Since 1922.

3944 Q. Are they a paid service?

A. Yes, sir.

3945 Q. Now you have some other data prepared by him?

A. Yes, sir.

3946 Q. I hand you a paper marked Exhibit 57 which purports to be a Comparison and Percentages of Expenses to Gross Earnings for Member Banks of the Federal Reserve System for the year ending June 30, 1927, and compiled by Stronck and Company. Are those diagrams sent to you and other banks as a part of a service?

A. Yes, sir.

3947 Q. A paid service?

A. Yes, sir.

3948 Q. Are those calculations contained in those several sheets recognized by bankers as accurate?

[fol. 865] Mr. Ferneau: Objected to as incompetent, irrelevant and immaterial, no foundation laid.

The Court: Overruled.

Exception.

A. Yes.

3949 Q. And accepted by them in their business?

Mr. Ferneau: We make the same objection.

The Court: Overruled.

Exception.

A. Yes.

3950 Q. And handing you Exhibit 58, which purports to be the same thing for 1926 from the same Company, I will ask you, is your testimony the same concerning it?

Mr. Ferneau: Objected to as incompetent, irrelevant and immaterial, no foundation laid.

The Court: Overruled.

Exception.

A. Yes, sir.

3951 Q. And I hand you Exhibit 59, which purports to be the data for the year 1924 and ask you if that is one of the same character of diagrams?

Mr. Ferneau: Object as no foundation laid, incompetent, irrelevant and immaterial.
The Court: Overruled.

Exception.

A. Yes.
3952 Q. Diagram, Exhibit 59, is received by your bank as a part of a paid service?

Mr. Ferneau: We make the same objection.
The Court: Overruled.

Exception.

A. Yes.
3953 Q. Is it accepted by the banks as an accurate state-
[fol. 866-869] ment and used by them in connection with their business?

Mr. Ferneau: Object as no foundation laid, incompetent, irrelevant and immaterial.
The Court: Overruled.

Exception.

A. Yes, sir.
3954 Q. The figures you have offered as to percentages of net loss to gross earnings, was it taken from the instrument you have just identified?
A. Yes, sir.

[fol. 870] By Mr. Ferneau:

3955 Q. You testified yesterday you used the Comptroller's Reports for your data, or part of it?
A. I testified that the information I am giving comes from Stronck and Company who issue weekly bulletins to the Comptroller's reports.
3956 Q. Do I understand you to say you didn't use these reports at all in your compilation?
A. I used the weekly bulletin.
3957 Q. Are you testifying you didn't use these reports at all?
[fol. 871] A. I used the weekly bulletins, only.

By Mr. Ferneau:

[fol. 872] 3958 Q. Now, Mr. Schantz, what we have talked about the percentage of losses on deposits; now where did you get the data for the other percentages you gave?

A. Which other percentages?

3959 Q. The percentages on deposits and on loans and on earnings.

A. The losses based on loans and investments and on total deposits, that is my own compilation.

3960 Q. No, I am asking you, you gave them generally in the Kansas City District yesterday.

A. On loans and investments I didn't mean the Kansas City District, that is based on Nebraska and is my own observation.

3961 Q. What did you testify to regarding the Kansas City District?

[fol. 873] A. The net profits based on gross earnings and the loss based on gross earnings.

3962 Q. Now I asked you considerable about losses on loans in the Kansas City District, per one hundred dollars of loans. Do you know what that is for the period ending June 30, 1927 and to June 30, 1928?

A. I think it is marked in that book you have there.

3963 Q. You testified from this book yesterday?

A. You showed me a book and asked me to repeat a figure.

Mr. Gaines: I had the same book on direct examination.

By Mr. Ferneau:

3964 Q. Now it shows the loss for one hundred dollars of loans for all member banks is fifty-two hundredths per cent, doesn't it?

A. That means all member banks in the United States, covering all Federal Reserve Districts. There is a separate compilation of the Kansas City District.

3965 Q. It shows in 1927 all member banks, fifty-three hundredths per cent, doesn't it?

A. That covers all banks in the United States Federal Reserve District.

3966 Q. And it shows state member banks thirty-three hundredths per cent?

A. Yes, sir.

3967 Q. For 1928 state member banks thirty-three hundredths per cent and for 1927 thirty-eight hundredths per cent; now the same compilation shows loss for one hundred [fol. 874] dollars of investments for all member banks is forty hundredths per cent?

A. For all banks in the United States.

3968 Q. All banks for 1927 the same, forty hundredths per cent and for national bank members in 1928, forty-three hundredths per cent and in 1927, forty-five hundredths per cent and for state member banks in 1928, thirty-four hundredths per cent and in 1927, twenty-nine hundredths per cent. Now that is all member banks over the United States?

A. Yes, sir, all the way through.

Mr. Ferneau: As a part of the cross examination I want to offer in evidence that part of the Federal Reserve Bulletin of December, 1928, on page 877: the heading which I desire to offer is "All member banks, 1927–1928; National member banks, 1927–1928; State member banks, 1927–1928" and under the column of member banks offer that part of it which says "Losses on loans per one hundred dollars of loans" and the other part which says "Losses on investments per one hundred dollars of investments".

Mr. Gaines: Object as counsel is now offering in evidence what he has just read and it is not proper cross examination.

The Court: Overruled.

Exception.

Exhibit No. 60 received in evidence, is attached to and made a part of this Bill of Exceptions, appearing at Page 912 hereof.

3969 Q. Mr. Schantz, I desire to call your attention to [fol. 875] the Federal Reserve Bulletin of December, 1928, page 879. On that page it shows compilations of the Federal Reserve Districts of the entire United States.

A. In separate districts.

3970 Q. Yes. Now, calling your attention to the Kansas City District, under the headings of 927 and 1928, that would be for the years ending June 30, 1927 and June 30,

1928. Calling your attention to that part of it which shows losses on loans per one hundred dollars of loans for the Kansas City District, it shows for 1928 one and twelve hundredths per cent on one hundred dollars of loans?

A. Yes, sir, on loans.

3971 Q. And in 1927, one and fifty-seven hundredths per cent, doesn't it?

A. Yes, sir.

3972 Q. Now the same compilation for the Kansas City District shows losses on investments, per one hundred dollars of investments, thirty-three hundredths per cent for 1928 and for 1927 thirty-nine hundredths per cent?

A. Yes, sir.

3973 Q. Now, you might explain what is meant by investments?

A. Loss on bonds.

3974 Q. That is the reason the loss on investments is so very low as compared with the other losses?

A. Yes, sir.

3975 Q. Now, why did you give the percentage of loss on deposits alone in your compilation you gave Mr. Gaines?

A. I separated it in two ways, giving the loss on invest- [fol. 876] ments and loans and for total deposits. I do that for our own information.

3976 Q. You said you got your information for percentages on deposits from these bulletins. Did you get your information on the percentages on gross earnings from those?

A. Yes, sir.

3977 Q. That is all you got from those?

A. Yes, sir.

3978 Q. You didn't get any other data from those at all, except on gross earnings?

A. That is all.

3979 Q. You didn't figure it on loans and investments?

A. No, sir, that is my own compilation for the state of Nebraska.

3980 Q. Do you mean to tell me your testimony yesterday was confined to the state of Nebraska on all your percentages except on gross earnings?

A. I mean my own observation.

3981 Q. Answer my question.

Mr. Gaines: Read the question again.

Question read.

Mr. Gaines: Objected to as not proper cross examination.
The Court: Sustained.

Exception.

3982 Q. Did you use any other data for your percentages of losses on gross earnings, except these books I have mentioned?

Mr. Gaines: We object as the testimony has been withdrawn and this is not proper cross examination.
[fol. 877] The Court: Sustained.

Exception.

3983 Q. Now, did you use any publication with reference to your other percentages?

A. You refer to losses on loans and investments and on deposits?

3984 Q. Yes.

A. No, I used my own judgment.

3985 Q. Did you use any data of any kind?

A. I took it from the knowledge of my own banks and the banks we are doing business with.

3986 Q. The knowledge you have of your own bank; how many banks did you say you did business with?

A. About one hundred fifty in Nebraska.

3987 Q. And how many of those do you loan money to?

A. About forty five.

3988 Q. And the others deposit money in your bank, only?

A. At times they borrow.

3989 Q. But about forty five of them are borrowers?

A. Yes, sir.

3990 Q. Now, what information do you have as to the condition of those banks who borrow money from you?

A. I talk those matters over with their officers when they come in to borrow money; we talk over losses, expenses and earnings.

3991 Q. Now is that all you have?

A. Yes, sir.

3992 Q. You have no official data, no report of any kind?

A. No, sir.

[fol. 878] 3993 Q. You have to take their word for it?

A. Our man out in the state sometimes examines those banks and makes a report.

3994 Q. How many banks has he examined in the last year?

A. Oh, I would say eight or ten.

3995 Q. Now the other banks that deposit money with you; you have no occasion to look into those banks, do you?

A. No, but we discuss our banking affairs together; they give me information concerning themselves.

3996 Q. You have no official reports, no official data to base it on?

A. No, sir.

3997 Q. And your opinion you gave yesterday as to the percentages of losses to deposits in Nebraska is based on what those bankers told you?

A. It is based on my own opinion.

3998 Q. Your opinion is based on what they told you?

A. In connection with my knowledge of our own bank.

3999 Q. As compared to the other banks, it is just what they told you?

A. Yes, sir.

Mr. Ferneau: I move to strike the witness' testimony out as to percentages of state banks in Nebraska, percentages as to deposits and earnings for the reason no proper foundation was laid, witness has shown no qualification, it is based entirely on hearsay except as to his own bank and that he has already testified to—as to percentage of loss [fol. 879] in his own bank—it is hearsay, the testimony coming only from forty banks and is not based on any official or written report but simply hearsay and the same is wholly hearsay and incompetent, irrelevant and immaterial.

Mr. Campbell: Intervenors join in the motion.

The Court: Let the testimony stand for what it is worth. I will receive the testimony and overrule the motion.

Exception.

4000 Q. Now, Mr. Schantz, these forty banks or approximately forty banks that borrow money from you, when have any of your examiners been there to those banks?

A. Our man makes a trip through the state about six times a year and calls on the banks.

4001 Q. When was the last time?

A. About three weeks ago.

4002 Q. How many banks did he visit?

A. Oh, I guess he visited eight or ten on the trip.

4003 Q. In what part of the state are these forty banks that borrow money from you?

A. In different parts of the state, they cover the entire state.

4004 Q. And yesterday you testified—I want to get an understanding of this—you testified today that the only percentages you gave yesterday concerning the Kansas City District was confined to the percentage of losses on deposits?

Mr. Gaines: Objected to as not properly reflecting the testimony of the witness.

[fol. 880] No ruling.

4005 Q. What was your testimony as to the percentage of charge offs in the Kansas City District yesterday?

Mr. Gaines: Objected to as not proper cross examination.

The Court: Sustained.

Exception.

4006 Q. You confined it today to what items?

A. Based on the Kansas City District, four items.

4007 Q. Four items?

A. Yes, sir.

4008 Q. You are testifying to four items in the Kansas City District?

A. The percentages based on gross earnings——

Mr. Gaines: Object as that has gone out of the record.

4009 Q. What percentage did you give for the charge offs on earnings in the Kansas City District, yesterday?

Mr. Gaines: Object as he is asking for all our testimony; the record speaks what he testified to.

No ruling.

4010 Q. What was the percentage of charge offs compared to gross earnings in the Kansas City District from June, 1927 to June, 1928?

Mr. Gaines: Object as not proper cross examination, this witness having no testimony before the court as to charge offs based on gross earnings; that was all eliminated.

[fol. 881] The Court: Sustained.

Exception.

4011 Q. And the percentage of losses to deposits in the Kansas City District?

A. The only percentage I have on losses based on total deposits is one and fifty two hundredths percent and that is my opinion based on the state of Nebraska and conditions as I think I know them.

4012 Q. And the only data you have for that is what you testified to?

A. Yes.

4013 Q. Did you take any data from the Comptroller's reports?

A. No, sir.

4014 Q. Did you take any data from the Government reports?

A. No, sir.

4015 Q. That is a compilation from what the bankers told you?

A. This is my information gathered through the year.

4016 Q. How did you get that information?

A. It is based on conversations with bankers of the state who come in and talk with me.

4017 Q. What years are you covering?

A. I am covering from 1924 to 1928.

4018 Q. What was it in 1924?

A. That is an average from 1924 to 1928.

4019 Q. What was it in 1924?

A. I haven't got my figures.

4020 Q. Did you have it in your figures?

A. Yes, I presume so.

4021 Q. What figures did you base it on?

[fol. 882] A. I took the figures I had gathered in conversations with others bankers and the figures on my own bank and they are higher than these.

4022 Q. Can't you tel me anything about 1924?

A. No, sir.

4023 Q. You put those figures down and averaged them?

A. Yes, sir.

4024 Q. Where are those figures?

A. I didn't keep those, I simply got my average.

4025 Q. You got your average; can you make those figures for me?

A. Why I suppose I can.

4026 Q. Will you do that?

A. I don't think they will differ much from one year to the other; this is purely my opinion.

4027 Q. But you had, when you arrived at an average, you must have had figures for each year?

A. Yes, and there wasn't much difference between those years.

4028 Q. What was it for 1925?

A. I don't think it will change much.

4029 Q. Well, what was it?

A. I can't tell you.

4030 Q. What was it for 1926?

A. I can't tell you.

4031 Q. The real truth about it is you didn't have any figures?

A. That is not the truth.

4032 Q. Well, I wish you would make figures to show it.

A. This is my opinion of the average losses based on [fol. 883] total deposits.

4033 Q. Can't you give me any figures?

A. That is my estimate based on my judgment.

4034 Q. Just your own judgment?

A. My judgment and general conditions.

4035 Q. You testified that the percentage of charge offs to gross earnings was sixteen and eight hundredths per cent, yesterday.

Mr. Gaines: Objected to as not proper cross examination in the present state of the record.

No ruling.

4036 Q. You testified that the percentage of charge offs to loans in the Kansas City District are two and fifteen hundreths percent?

Mr. Gaines: Object as calling for recollection of the testimony.

The Court: Overruled.

Exception.

A Yes, sir.

4037 Q Upon what figure did you base that?

A On the knowledge I have of my own bank and the knowledge of other banks about what the charge offs are, based on loans and investments.

4038 Q You testified in regard to the Kansas City District?

A If so it is not correct, it is based on Nebraska.

4039 Q If you did so testify it was not correct?

A If I did testify to that it should have been Nebraska.

4040 Q Now, Mr. Schantz, can you tell me what the percentage was of charge offs to deposits that you testified to, in 1927?

[fol. 884] A I gave you the average for four years, in my judgment one and fifty-two hundredths percent. I can't tell you what it was in 1927.

4041 Q You have no figures here concerning that?

A No.

4042 Q You have no data from which you got that estimate, showing how you figured that?

A No, sir, that is my judgment and my opinion.

4043 Q It is just your opinion, based on the same testimony you have given, on what somebody told you?

A On my visits with bankers and the facts in our own bank.

4044 Q I asked you yesterday about when the trouble from the deflation period started here in Nebraska, and the Kansas City District.

A I don't remember your asking me but I can answer, about 1920.

4045 Q And it has continued down to the present time?

A Yes.

4046 Q What effect did that deflation have on Nebraska banks?

A About the same it had on other banks—agricultural values were reduced.

4047 Q. Did it cause them to take excessive losses on account of it?

A. Yes.

4048 Q. It was an abnormal period?

A. Yes.

4049 Q. From 1920 to 1928 was an abnormal period, as far as banks were concerned?

A. Yes.

4050 Q. And an abnormal period as far as losses were concerned?

[fol. 885] A. Yes.

4051 Q. Can you tell me how much should be added to the percentage of losses on account of the deflation?

A. No, I don't care to make any estimate.

4052 Q. Would it be one-half?

A. I don't care to make any estimate.

4053 Q. What was it in your bank?

A. The Department has the figures.

4054 Q. How much did it increase the percentage of loss in your bank?

A. I can't tell that without figures or without my books. I haven't them here.

4055 Q. What states are included in the Kansas City Reserve District?

Mr. Gaines: Object as immaterial.

The Court: Overruled.

Exception.

A. Nebraska, Kansas City, Oklahoma, Wyoming, Denver, part of Colorado, the northern part of New Mexico.

4056 Q. Would the average percentage of losses, charge offs, to deposits and gross earnings over the country be about the same as Nebraska except for this deflation period or would Nebraska be about the same as the others, with that exception?

A. I think the agricultural sections carried the heaviest losses during the entire period.

4057 Q. What I want to know, Mr. Schantz, would the percentage of losses to gross earnings and deposits and investments be about the same for Nebraska as the rest

of the country, except for these abnormal losses on account of this deflation?

A. They were far in excess in the agricultural sections.

[fol. 886] 4058 Q. That would include Nebraska?

A. Yes, sir, Nebraska is agricultural, the entire section is agricultural.

Mr. Ferneau: Will you please read the question?

Question read.

A. No, I think the losses are greater in this section of the country than in the eastern sections.

4059 Q. Then greater in Nebraska, of course?

A. Yes, sir.

Mr. Ferneau: I would like to have the witness make me figures on which he bases his opinion, for each year from 1924, down. I think I am entitled to have it for cross examination.

The Court: Yes, I think he is entitled to that.

Mr. Gaines: What you want are the figures on the four years based on deposits, based on loans, based on investments. You see the gross earnings have been eliminated.

[fol. 887] Mr. Albert L. Schantz resumed the stand for further cross examination.

By Mr. Ferneau:

4060 Q. Did you make those figures, Mr. Schantz?

A. Yes, I have them.

(Mr. Ferneau takes paper from witness.)

4061 Q. Mr. Schantz, what was the percentage of losses to deposits in your bank in the year 1926?

A. Based on deposits?

4062 Q. Yes, sir.

A. About one and three-fourths per cent.

4063 Q. What was it on loans? Give me the amount of deposits and losses for 1926.

A. Deposits, $6,300,000. Losses, $110,000.

4064 Q. Now the loans for 1926?

A. $4,600,000.

4065 Q. And the losses were the same, $110,000?

A. Yes.

4066 Q. Did you actually charge that off in 1926?

A. Yes.

4067 Q. What were your loans for 1925?

A. $4,600,000.

4068 Q. What was your loss for 1925?

[fol. 888] A. About $88,000.

4069 Q. What were your deposits for 1925?

A. $6,200,000.

4070 Q. Now, did you actually charge off $88,000 in 1925?

A. Yes, sir.

4071 Q. Do your loans include bond investments too?

A. No, sir.

4072 Q. What was it in 1924, your deposits?

A. $6,000,000.

4073 Q. And what were your losses?

A. About $82,000.

4074 Q. And what were your loans?

A. $4,300,000.

4075 Q. You actually charged off $82,000 in the year 1924, did you?

A. Yes, sir.

4076 Q. How much bond investments did you have in 1926?

A. $1,130,000.

4077 Q. Now, how much of the loss of $110,000 in 1926 did you apportion to bond loss?

A. None.

4078 Q. None at all. What were your bonds in 1925?

A. $1,125,000.

4079 Q. And in that year did you apportion any of the loss to bonds?

A. None.

4080 Q. In 1924 how much were your bond investments?

A. $715,000.

4081 Q. None of that was apportioned to loss, no losses in your bonds?

A. No, sir.

4082 Q. Now, Mr. Schantz, I believe you testified yester-
[fol. 889] day that approximately three hundred state banks, if they should pay this assessment for any appreciable length of time would suffer capital impairment and could not continue in business?

A. That is the information I received from Mr. Bliss' office.

4083 Q. I am asking you if you so testified?

A. Yes, sir.

4084 Q. Is that true?

A. I don't know.

4085 Q. Are you testifying as to what somebody told you or to what you know from your own information?

A. That is the information Mr. Bliss gave me.

4086 Q. That was just what Mr. Bliss told you, you had no other information?

A. I knew there were a good many banks that were not making earnings.

4087 Q. Do you have any information except "what somebody told me"?

A. I get my knowledge from conversations with bankers in bankers' meetings and bankers who call at my own bank.

4088 Q. This conversation with Mr. Bliss is the one you have already related?

A. Yes, sir.

4089 Q. Now, your testimony in this regard is based on what you claim Mr. Bliss told you and what the other bankers told you?

A. Yes, sir.

4090 Q. That would be confined to the forty or fifty banks who borrow money from you?

A. I wouldn't say that.

[fol. 890] 4091 Q. Well, how many banks?

A. A very large number; we meet them in conventions and there isn't a day that bankers are not calling on me, whether they do business with me or not.

4092 Q. You are not testifying from any figures of any kind on that?

A. No, that is from my knowledge gained from conversations with these bankers.

4093 Q. Nor from any written reports?

A. No, sir.

4094 Q. Now, when did you first learn of the condition of the Guaranty Fund?

Mr. Gaines: Objected to as not proper cross examination.

The Court: Sustained.

Exception.

4095 Q. You issued a pamphlet over your signature concerning the Guaranty Fund Law, in 1928?

Mr. Gaines: Objected to as not proper cross examination.

The Court: Sustained.

Exception.

4096 Q. I will ask you if in that report which—or if in a report which you issued over your signature, if you didn't refer to these advertisements and say in substance that "we can continue to say 'the story no other state can tell' "?

Mr. Gaines: Object unless counsel shows the paper so he can ascertain whether it contains his signature before he answers.

The Court: He is entitled to see the document.

(Mr. Ferneau produces paper.)

A. Yes, I quoted in this document "the story no other [fol. 891] state can tell".

4097 Q. That document was issued over your signature?

A. Yes, on March 10, 1928.

4098 Q. And how much did you circulate it, how widely was it circulated?

Mr. Gaines: Objected to as not proper cross-examination.

The Court: Overruled.

Exception.

A. I ordered two thousand.

4099 Q. What did you do with the two thousand?

A. Laid them on the counter in the bank.

4100 Q. Now, in that pamphlet didn't you state that the

4106 Q. How did the bankers come to adopt this phrase?

A. I couldn't tell you that.

4107 Q. How did you come to adopt it?

A. Because it was being used at that time.

4108 Q. You mean to tell me you didn't adopt it because it was in that advertisement?

A. No, I didn't.

4109 Q. Isn't that the first advertisement that it ever appeared in concerning the state banks in Nebraska?

A. We wouldn't know without seeing the advertisements

4110 Q. You mean to say you haven't ever seen them?

A. I mean to say I don't know whether it appears in the first one.

4111 Q. When did the bankers first begin to use this "The Story No Other State Can Tell"?

Mr. Gaines: Object as he can't answer for anybody but himself.

No ruling.

A. I don't know.

4112 Q. What did you mean by it when you put in this pamphlet, "We can continue to say 'The Story No Other State Can Tell' "?

A. I meant exactly what the pamphlet reads and believed it at the time.

4113 Q. When you used this phrase, "We can continue to [fol. 895] say the 'story no other state can tell' "?

A. That was a phrase being used at that time generally.

4114 Q. What did you mean by it?

A. What it reads.

4115 Q. Did you have any purpose in putting it in there?

A. Just what it reads and no other purpose.

4116 Q. What did you mean, the story you referred to?

A. That they had paid their depositors up to that time.

4117 Q. They hadn't paid their depositors up to that time.

A. I think they had.

4118 Q. You say in the pamphlet there was a ten million dollar deficit?

A. Ultimately, yes; that was my opinion.

Mr. Ferneau: I believe that is all.

Examined by Mr. Campbell, for the intervenors:

4119 Q. Mr. Schantz, did you furnish this to other banks in the state?

A. No, sir.

4120 Q. But you did give it to your depositors?

A. It was laid on the counter in our bank.

4121 Q. It was laid there for your depositors?

A. It was laid on the counter and if they wanted to take it they could.

4122 Q. That was on the counter where the depositors wrote out their checks?

[fol. 896] A. Yes, sir, and our statement, appears there, our call statement.

4123 Q. Now, what was your purpose in preparing this pamphlet and placing it on the counter of the bank?

Mr. Gaines: Objected to as not proper cross examination.

The Court: Sustained.

Exception.

4124 Q. Mr. Schantz, did you at that time, that is in March, 1928, believe that a special assessment of five-tenths percent on average daily deposits would drive the stronger banks of the state to nationalize and the rest to liquidate?

A. Yes, sir.

4125 Q. You believed that at the time you prepared this pamphlet?

A. Yes, sir.

4126 Q. When did you first believe that?

A. When the losses began to mount into much larger figures.

4127 Q. Fix the date.

A. I can't.

4128 Q. Fix the year?

A. I can't give you the year?

4129 Q. Was it prior to 1920?

A. I would say about the time this pamphlet was published. That expressed my opinion at that time; I believe that is the only time I expressed my opinion in writing.

4130 Q. My question is, when did you first have an

opinion that this assessment would cause the strong banks to nationalize and cause the rest to liquidate?

A. About the time that pamphlet was written.

[fol. 897] 4131 Q. About March, 1928?

A. Yes, sir.

4132 Q. Had you had such an opinion prior to that date?

A. No, I don't think so.

4133 Q. Now, when did you first—did you ever express such an opinion?

A. Not that I remember before that date.

4134 Q. Have you at any time since March, 1928, until you testified on this trial made a statement to the effect that the assessment would have such an effect?

Mr. Gaines: Objected to unless he confines it to his testimony. I didn't ask him about any prior assessments.

The Court: He may answer.

Exception.

A. If the assessments were continued they would have that effect; I may have said that.

4135 Q. When and where?

A. I don't recall that.

4136 Q. Do you recall ever having made such a statement until you testified at this trial?

A. No, I don't recall.

4137 Q. Mr. Schantz, do you mean by your opinion stated in your direct examination, that this assessment, if continued would have that effect?

A. Yes, sir.

4138 Q. I hadn't quite formed the question. Do you mean to say it would be the sole cause in making the strong banks nationalize and in liquidating the balance of the [fol. 898] banks of this state?

A. I mean if the assessments are continued the only thing a strong good bank, if they are continued, could do would be to nationalize. They can't continue paying these assessments over a long time and keep the doors open.

4139 Q. Mr. Schantz, will an assessment of six-tenths of one percent on the average daily deposits close the doors of your bank?

Mr. Gaines: Object to that; we didn't ask a question as regards his bank.

The Court: Overruled.

Exception.

A. We would refuse to pay the special assessments and would nationalize.

4140 Q. Mr. Schantz, is that the position of the strong banks of this state?

Mr. Gaines: Object to that unless he knows, it is calling for hearsay testimony.

The Court: He may answer.

Exception.

A. Some of the other large, strong banks in this state have told me they would be compelled to nationalize.

4141 Q. Is that the position of the strong banks, plaintiffs here, as you understand?

A. Some of the large, strong banks have made that statement to me.

4142 Q. Now, Mr. Schantz, will you answer the question as I originally asked it: could your bank pay this assessment without liquidating?

Mr. Gaines: Objected to as not proper cross-examination. [fol. 899] The Court: Sustained.

Exception.

4143 Q. Did you mean to state that the strong banks would nationalize as a matter of public policy or do you mean to say they would nationalize as a matter of necessity?

Mr. Gaines: Object to that as the witness has not put it that way, except as to his opinion of what they will do.

The Court: Overruled.

Exception.

A. From my opinion, from what they told me they will nationalize.

Mr. Campbell: Read the question again.

Question read.

A. I don't know what their motive would be.

Mr. Gaines: We make the further objection, the word "necessity" may be one thing to one man and another thing to another man.

No ruling.

4144 Q. Mr. Schantz, do you mean that to survive the strong state banks will be forced to nationalize or do you mean that in your opinion they would prefer to nationalize if these assessments are continued?

A. In my opinion they haven't much choice in order to meet the competition of the national banker on the opposite corner.

4145 Q. Now would it be your statement then, that they would nationalize as a matter of necessity, to escape insolvency?

Mr. Gaines: Objected to as not proper cross examination.

The Court: He may answer.

Exception.

[fol. 2000] A. To meet the competition of the national banks who are not paying this special assessment the best state banks would have to, in doing business.

4146 Q. I don't believe you understood my question; at least you didn't answer it.

A. I would think it was good business judgment to nationalize.

4147 Q. Then you would not state it would be a matter of escaping insolvency?

A. It might be with some banks.

4148 Q. But not with all, is that correct?

A. Yes.

4149 Q. Mr. Schantz, would the assessments made in 1921, 1922 and 1923, each year being more than six-tenths of one per cent, cause any bank, any strong state bank, to nationalize?

Mr. Gaines: Objected to as not proper cross examination; he expressed his opinion only as to the future, if the assessments were continued.

The Court: He may answer.

Exception.

Mr. Gaines: Objected to as calling for hearsay testimony, pure conclusion.

The Court: Overruled.

Exception.

A. I don't know.

4150 Q. Mr. Schantz, is it the amount of the assessment that in your opinion would cause the strong banks to nationalize and render the balance insolvent?

A. Yes, sir.

4151 Q. Is there any size assessment that could be made, [fol. 901] in your opinion, that would not have that effect?

Mr. Flansburg: Objected to as speculative.

The Court: Sustained.

Exception.

4152 Q. Would an assessment of one fourth of one per cent, in your opinion, have that effect?

Mr. Flansburg: Objected to as speculative.

The Court: Sustained.

Exception.

4153 Q. What assessment did you refer to when you said that in your opinion it would cause the strong banks to nationalize and the liquidation of the balance?

Mr. Gaines: Objected to as repetition.

No ruling.

A. The extra assessment of one half of one per cent per year.

4154 Q. Were you in any way referring to the regular assessment of one-tenth of one per cent?

A. No, sir.

4155 Q. Now, is it your opinion that any assessment in excess of one-tenth of one per cent per annum upon the average daily deposits will cause the strong state banks to nationalize and the rest to liquidate?

Mr. Gaines: Objected to as speculative and having been ruled on.

The Court: Overruled, but I think this cross examination

has been rather sweeping; we have been three and a half hours on it.

Exception.

A. I believe any assessment that will ask the good, solvent state banks to pay the losses of the incompetent or the [fol. 502] dishonest banker will not meet with the approval of the better state bankers.

Mr. Campbell: I move to strike the answer as not responsive to the question.
The Court: Sustained.

Exception.

Mr. Campbell: Will you read the question.

Question read.

A. I can't speak for the bankers on that subject.

Mr. Campbell: I move to strike out the answer as not responsive.
The Court: Overruled.

Exception.

4156 Q. Mr. Schantz, were you speaking for the bankers of this state when you stated that, in your opinion, the present assessments, if continued would wipe out the state banks of the state?

Mr. Gaines: Objected to as not proper cross examination and does not reflect the testimony of Mr. Schantz.
The Court: Objection sustained.

Exception.

4157 Q. Mr. Schantz, without speaking for the bankers of the state you may state whether, in your opinion, any assessment in excess of one-tenth of one per cent will drive the strong state banks to nationalize and the weaker ones to liquidate?

Mr. Gaines: Object as he can't give an opinion on that.
The Court: He may answer.

Exception.

A. I don't know.

4158 Q. Mr. Schantz, which state banks do you refer to [fol. 903] when you state that in your opinion they would nationalize?

Mr. Gaines: Object to that question. He has never stated any specific bank would do it.

The Court: He may answer.

Exception.

A. A number of banks but I can't give you their names.

4159 Q. Now, will you take the list of banks plaintiffs herein and point out the ones that in your opinion will nationalize if this assessment is continued?

Mr. Gaines: Object as it isn't fair to ask a man to give his opinion as to what some other man will do.

Mr. Campbell: Withdraw the question.

4160 Q. Are you able to state which the strong banks were that you referred to when you said they would nationalize?

Mr. Gaines: Object. He should be required to pick out any specific banks and state their name.

The Court: He may answer.

Exception.

A. No.

Mr. Gaines: Object to the question because he has never said they would nationalize.

4161 Q. Are you able to state to what state banks you refer when you said in your opinion they would liquidate if the assessments were continued?

Mr. Gaines: Objected to as not reflecting the testimony of the witness.

The Court: Overruled.

Exception.

A. No.

4162 Q. Do you mean the present assessment would have [fol. 904] that effect or do you mean a continuation of the assessment would have that effect?

Mr. Gaines: Objected to as his statement did not differentiate.

The Court: He may answer.

Exception.

A. The present assessment and a continuation of the extra assessments.

4163 Q. In your opinion would the present assessment, standing alone, have that effect?

A. I can't answer that question, I don't know.

4164 Q. In your opinion, would the present assessment with a continuation for the year 1929 of two additional assessments have that effect?

Mr. Flansburg: Objected to as purely speculative.

The Court: He may answer.

Exception.

A. I don't know.

4165 Q. When, in your opinion, would these assessments have that effect?

A. I don't know.

4166 Q. Mr. Schantz, did you state you were on a committee with Mr. Paul Warburg and Mr. Roberts?

A. Yes, the Economic Policy Commission.

4167 Q. That committee has to do with studying the economic policies from the bankers' standpoint, does it not?

A. Yes, sir.

4168 Q. How long have you been on that committee?

A. About six months.

4169 Q. Who appointed you to that committee?

A. The president of the American Bankers Association. [fol. 905] 4170 Q. Who is that?

A. Frank B. Hazelwood.

4171 Q. Now, prior to your appointment on that committee you were an advocate of the Guaranty Fund system?

A. No, I wouldn't say so.

4172 Q. Will you say that you have not in the past been an advocate of the Guaranty Fund system?

A. I don't advocate the Guaranty Fund system, I operate under the Guaranty Fund system.

4173 Q. Mr. Schantz, have you not in the past, at any time, been a believer or a professed believer in the bank Guaranty Fund Act?

Mr. Gaines: Object as not cross examination.
The Court: Overruled.

Exception.

A. I have always considered that fundamentally the bank guaranty law was unsound where the good banker paid the debts of the poor banker.

4174 Q. Do you state now that you have always taken the position that the bank guaranty fund law was an unsound proposition?

Mr. Gaines: Object as not proper cross examination.
The Court: Overruled.

Exception.

A. My opinion was that fundamentally the guaranty law, where the good bankers guaranty the deposits of the poor banker is fundamentally unsound.

4175 Q. Are you the only one on that committee that has operated a bank under that system?

A. Yes, sir.

[fol. 906] 4176 Q. Those men have joked you a good deal about the system and where you came from, have they not?

A. They have not; it has not been discussed.

4177 Q. You have changed your attitude since you became a member of that committee, have you not?

Mr. Gaines: Objected to as repetition.
The Court: Sustained.

Exception.

4178 Q. Mr. Schantz, you are one of the plaintiffs in this action, are you not?

Mr. Gaines: It is conceded that the bank is, not Mr. Schantz.

4179 Q. Your bank is one of the plaintiffs in this action, is that correct?

Mr. Gaines: I object, that is not correct, you shouldn't ask his opinion of that. I conceded that, why go into it with him?

A. I didn't try to organize them.

1183 Q. What did you do?

A. We act as a committee to do whatever the bankers ask us to do.

1184 Q. What did you do?

A. We employed attorneys to protect our interest in this matter.

1185 Q. Didn't your committee, of which you were a part, invite every single state bank in this state to participate in this proceeding?

A. It was purely voluntary on the part of the banks.

Mr. Campbell: Move to strike out the answer as not responsive.

The Court: Sustained.

Exception.

A. It was purely voluntary on their part.

Mr. Campbell: Move to strike the answer as not responsive.

A. We sent out a circular letter telling what we were doing.

4186 Q. And in that circular letter did you not invite [illegible] them to participate and join in the proceedings?

A. If they wished to.

4187 Q. And in that invitation to join did you not report to these state banks of this state that the question involved was the assessment against the capital stock and the assessment should be made against stockholders instead of the banks?

Mr. Gaines: Object as this is not throwing further light upon his interest, his interest is already admitted.

The Court: Sustained.

Exception.

4188 Q. And didn't you report to them that if they did not join with your banks and your banks prevailed that those that did not join would have to continue paying the assessments?

Mr. Gaines: The same objection last made.

The Court: Sustained.

Exception.

Mr. Campbell: That is all.

Witness excused.

[fols. 909-912] Mr. ALBERT L. SCHANTZ, called as a witness in surrebuttal by the intervenors, testified as follows:

By Mr. Campbell:

4189 Q. Mr. Schantz, you spoke of having purchased receivers' certificates. Were you an officer of the Agricultural Loan Association that issued certificates in 1921 and 1922?

Mr. Gaines: Object as not proper surrebuttal, not proper to ask those questions at this time.

The Court: He may answer.

Exception.

A. Yes.

4190 Q. What was the amount of the certificates issued by that Association those two years?

A. About two million, five hundred thousand.

4191 Q. Do you recall what interest rate they bore?

A. No, sir.

Mr. Campbell: That is all.

Witness excused.

Recess.

[fol. 912a]

EXHIBIT 60

December, 1928, Federal Reserve Bulletin

Table 3.—Ratios—All Member Banks, by Federal Reserve Districts, Years Ending June 30, 1927 and 1928

	Federal Reserve District											
	Boston		New York		Philadelphia		Cleveland		Richmond		Atlanta	
	1928	1927	1928	1927	1928	1927	1928	1927	1928	1927	1928	1927
Amount per $100 of earning assets:												
Interest earned.....	$5.09	$5.13	$4.84	$4.87	$5.26	$5.40	$5.54	$5.63	$5.68	$5.76	$6.07	$6.13
All other earnings..	1.02	.87	1.33	1.30	.96	.84	1.04	1.04	.80	.78	1.10	1.05
Gross earnings..	6.10	6.00	6.17	6.17	6.23	6.24	6.58	6.67	6.48	6.54	7.17	7.18
Interest on deposits.	2.41	2.37	2.00	1.99	2.03	2.01	2.56	2.52	2.18	2.12	2.15	2.08
Interest on borrowed money	.08	.08	.08	.07	.09	.09	.07	.08	.13	.16	.19	.24
Salaries and wages.	1.02	1.03	1.14	1.14	1.08	1.09	1.18	1.21	1.26	1.30	1.52	1.53
Taxes.....	.24	.24	.22	.27	.34	.31	.40	.37	.41	.44	.49	.50
All other expenses..	.63	.62	.66	.68	.62	.62	.64	.67	.72	.71	.97	.96
Total expenses.	4.38	4.34	4.10	4.16	4.17	4.13	4.85	4.85	4.70	4.72	5.32	5.26
Net earnings....	1.73	1.65	2.06	2.01	2.06	2.10	1.73	1.82	1.78	1.81	1.86	1.92
Total losses.....	.72	.79	.46	.42	.47	.39	.51	.61	.73	.66	.95	.97
Recoveries	.21	.17	.11	.12	.15	.13	.10	.11	.15	.10	.21	.18
Net losses.....	.51	.62	.35	.30	.32	.27	.41	.50	.58	.56	.74	.80

EXHIBIT 60—Continued

	Federal Reserve District											
	Boston		New York		Philadelphia		Cleveland		Richmond		Atlanta	
	1928	1927	1928	1927	1928	1927	1928	1927	1928	1927	1928	1927
Net addition to profits	1.22	1.03	1.71	1.71	1.74	1.84	1.32	1.32	1.20	1.26	1.11	1.13
Other ratios:												
Earning assets per $1 of capital funds..	6.55	6.62	6.33	6.46	4.77	4.90	6.07	6.00	5.59	5.48	5.94	6.11
Net profits per $100 of capital funds..	7.96	6.83	10.84	11.05	8.27	9.00	8.02	7.91	6.71	6.88	6.61	6.88
Losses on loans per $100 of loan.....	.61	.58	.32	.29	.44	.26	.40	.46	.61	.61	.89	.96
Losses on investments per $100 of investments... ...	.64	.91	.53	.39	.28	.36	.34	.52	.57	.30	.36	.28
	Chicago		St. Louis		Minneapolis		Kansas City		Dallas		San Francisco	
	1928	1927	1928	1927	1928	1927	1928	1927	1928	1927	1928	1927
Amount per $100 of earning assets:												
Interest earned....	$5.17	$5.28	$5.54	$5.64	$5.67	$5.71	$6.15	$6.19	$6.47	$6.66	$5.72	$5.69
All other earnings..	1.23	1.14	.89	.89	.78	.74	.94	1.02	.82	.81	1.10	1.07
Gross earnings..	6.40	6.42	6.43	6.53	6.45	6.45	7.10	7.21	7.29	7.46	6.82	6.75
Interest on deposits..	2.14	2.12	2.05	2.07	2.37	2.38	2.10	2.11	1.70	1.69	2.36	2.31
Interest on borrowed money	.08	.08	.18	.18	.04	.05	.07	.07	.10	.16	.07	.08

Salaries and wages.	1.30	1.32	1.32	1.33	1.40	1.12	1.69	1.69	1.78	1.88	1.58	1.53
Taxes	.43	.41	.40	.49	.33	.35	.42	.42	.52	.56	.26	.29
All other expenses..	.83	.82	.77	.79	.78	.78	1.03	1.04	.98	1.04	.98	.90
Total expenses..	4.78	4.74	4.73	4.86	4.92	4.98	5.31	5.33	5.08	5.34	5.24	5.11
Net earnings....	1.62	1.68	1.70	1.66	1.53	1.47	1.79	1.88	2.22	2.13	1.58	1.64
Total losses.....	.52	.53	.61	.72	.93	.98	1.14	1.49	1.38	1.35	.83	.75
Recoveries	.12	.13	.19	.20	.29	.22	.33	.35	.35	.32	.17	.16
Net losses.....	.40	.40	.42	.52	.65	.75	.82	1.13	1.02	1.03	.66	.59
Net addition to profits	1.22	1.28	1.28	1.15	.89	.72	.97	.75	1.20	1.10	.91	1.05
Other ratios:												
Earning assets per $1 of capital funds..	6.91	6.97	6.55	6.46	7.73	7.60	7.54	7.46	5.44	5.10	8.24	8.38
Net profits per $100 of capital funds..	8.41	8.95	8.39	7.42	6.87	5.44	7.33	5.57	6.52	5.59	7.53	8.79
Losses on loans per $100 of loans.....	.45	.43	.58	.64	1.09	1.17	1.12	1.57	1.28	1.31	.60	.65
Losses on investments per $100 of investments	.20	.29	.22	.21	.23	.28	.33	.39	.17	.26	.40	.21

[fol. 913] Mr. Gaines: Plaintiffs rest in rebuttal.

Mr. Kirk Griggs, called by the defendants in surrebuttal after being first duly sworn, testified as follows:

Direct examination.

By Mr. Abbott:

4192 Q. State your full name.
A. Kirk Griggs.
4193 Q. Where do you live, Mr. Griggs?
A. In Omaha.
4194 Q. What is your occupation?
A. President of the Occidental Building and Loan Association.
4195 Q. How long has that been your ocupation, approximately?
A. A little over two years.
4196 Q. Prior to that time what was your occupation?
A. Secretary of the Department of Trade and Commerce for the State of Nebraska.
4197 Q. During what period were you Secretary?
A. From January, 1925 to January, 1927.
4198 Q. While you were Secretary of the Department of Trade and Commerce was your attention called to the—in 1926 to the matter of the publishing of a series of advertisements in the Omaha Bee?
A. Yes, sir.
4199 Q. Are you acquainted with Mr. Schantz who preceded you on the witness stand?
[fol. 914] A. Yes, sir.
4200 Q. Do you know Mr. Dan Stephens?
A. Yes, sir.
4201 Q. In connection with those advertisements did you come in contact with Mr. Schantz and Mr. Stephens?
A. Yes, sir.
4202 Q. You may state where and when and under what circumstances.

Mr. Flansburg: Objected to as not surrebuttal.
The Court: Sustained.

Exception.

4203 Q. Did you attend a meeting in Fremont in which those advertisements were all discussed and which Mr. Schantz and Mr. Stephens attended?

A. Yes, sir.

4204 Q. Do you recall about the date of that meeting?

A. It was probably in June, 1926.

4205 Q. Now you may state what Mr. Schantz and Mr. Stephens did at that meeting with respect to these advertisements?

Mr. Flansburg: Object as not surrebuttal.

The Court: You should get right to the point; this should be very limited and your questions should be almost leading, calling attention to what you want.

Exception.

4206 Q. Did Mr. Schantz, at this meeting in Fremont, participate in the discussion with respect to these advertisements?

Mr. Flansburg: Objected to as calling for conclusion of the witness and not proper surrebuttal.

The Court: Overruled.

Exception.

A. He was in the meeting, I cannot tell you just how much he discussed it.

4207 Q. At this meeting in Fremont did the persons [fol. 915] present, including Mr. Schantz and Mr. Stephens congregate around a table and put this list of the Bee advertisements up in reflected light and examine and comment on those advertisements?

Mr. Flansburg: Objected to as not proper surrebuttal, being general and an involved, leading question.

The Court: He may answer.

Exception.

A. They were given the opportunity to comment on it. I know Mr. Stephens commented to considerable length. I can't say as to what was said by Mr. Schantz; they were all given an opportunity to discuss it.

4208 Q. In that meeting did Mr. Schantz, in the reflected light there, look over these advertisements and the pictures that were a part of them?

Mr. Flansburg: Objected to as leading.
The Court: Overruled.

Exception.

A. Yes, sir. I would like to qualify that just a little bit. These pictures were all placed before us. We were seated before them and he was given the same opportunity to see them that we were. Of course, I cannot say that he was there all the time.

4209 Q. And were they turned over one by one?

A. They were turned one at a time and discussed one at a time.

4210 Q. And in the discussions there were the suggestions of Mr. Schantz and Mr. Stephens acceded to?

Mr. Flansburg: Objected to as assuming facts not proved.

[fol. 916] Mr. Abbott: Withdraw the question.

4211 Q. At this meeting did Mr. Schantz and Mr. Stephens and the others present all agree finally on the form those advertisements would take?

Mr. Flansburg: Objected to as calling for a conclusion and leading.

Mr. Abbott: Withdraw the question.

4212 Q. Did Mr. Schantz make any objection to those advertisements at that time in the manner that they were finally agreed upon?

Mr. Flansburg: Objected to as assuming that they were finally agreed upon.

The Court: He may answer.

Exception.

A. No.

4213 Q. And where was that meeting held?

Mr. Flansburg: Objected to as immaterial.
The Court: Sustained.

Exception.

4214 Q. Were the advertisements published in the form that they were agreed upon at that time?

Mr. Flansburg: Objected to as not proper surrebuttal.
The Court: Sustained.

Exception.

4215 Q. You saw those advertisements as published, did you, Mr. Griggs?

Mr. Flansburg: Objected to as immaterial and not surrebuttal.
The Court: Sustained.

Exception.

4216 Q. Did you prepare any of these advertisements?
[fol. 917] A. No, sir.
4217 Q. Did you furnish any of the written matter that was to go into them?

Mr. Flansburg: Object as not surrebuttal.
The Court: Overruled.

Exception.

A. No, sir.
4218 Q. Do you know whether or not at the time of their publication there was a letter signed by Mr. Schantz and others with reference to the publication of them?

Mr. Flansburg: Objected to as not proper surrebuttal.
The Court: He may answer.

Exception.

A. Just prior to the publication there was such a letter.
4219 Q. Have you made a search, Mr. Griggs, to locate a copy of that letter?
A. Yes.
4220 Q. And have you been able to locate a copy of that letter?
A. I have not.
4221 Q. You may state, as near as you can, the contents of this letter to which Mr. Schantz' signature was attached and give the contents of this letter.

Mr. Flansburg: Object as not proper surrebuttal.
Mr. Abbott: Withdraw the question.

4222 Q. Just prior to the publication of the advertisements was there a letter signed by Mr. Schantz and others that was circulated generally, commendatory to the plan and inviting the banks to join in the publication?

Mr. Flansburg: Objected to as calling for the contents [fol. 918] of a written instrument and not the best evidence.
The Court: He may answer.

Exception.

A. There was a letter endorsing the move.
4223 Q. And to which Mr. Schantz' name was attached?
A. I seem to recollect Mr. Schantz headed the list.
4224 Q. And is that the letter you referred to as the one you had been unable to find a copy of?

Mr. Flansburg: Object as immaterial.
The Court: Overruled.

Exception.

A. Yes, sir.
4225 Q. Now, Mr. Griggs, immediately after you went into office in the year 1925 was there any meeting of bankers with you at which Mr. Schantz was present and with reference to the then state of the Guaranty Fund?

Mr. Flansburg: Objected to as not proper surrebuttal.
The Court: Overruled.

Exception.

A. Yes, sir.
4226 Q. Where was that meeting held?
A. At the Governor's office in the Capitol Building at Lincoln.
4227 Q. And about when?
A. About—I would say about the 20th of January, 1925.
4228 Q. And who was present besides Mr. Schantz?
A. There were quite a few representative bankers, both national and state bankers from all over the state.
4229 Q. You may give the names, as far as you recall them.

[fol. 919] Mr. Flansburg: Object as not proper surrebuttal.

The Court: Objection sustained.

Exception.

4230 Q. Now what did you say at that meeting to Mr. Schantz and the others present with respect to the then state of the Guaranty Fund?

Mr. Flansburg: Objected to as no foundation laid, and not proper surrebuttal.

The Court: He may answer.

Exception.

4231 Q. State in your own way, Mr. Griggs.

A. I said I had just come into the office and had made a resume of the condition of the state banks as shown by the examiners, the reports of the bank examiners, and I in a general way outlined as near as I could the condition of the state banks at that time.

Mr. Flansburg: Object as not responsive. Move to strike out the answer as not responsive.

Mr. Abbott: Withdraw the answer. Will you please read the question again.

Question read.

A. I told them I had made a resume of the condition of the state banks, that I wanted them told the condition at once and asked for their advice as to handling the situation.

Mr. Flansburg: Move to strike out the answer as not responsive.

The Court: Sustain the motion to strike out. Get the point you want and challenge his attention to that.

Exception.

4232 Q. What did you say to Mr. Schantz and others [fol. 920] there present as to the liabilities and probable liabilities of the Guaranty Fund?

A. I told them that I figured the losses then existing, payable out of the Guaranty Fund, would amount to over six million dollars.

4233 Q. And what did you say to them as to the number of banks in your judgment involved?

A. Definitely and probably involved, about two hundred fifteen.

4234 Q. Was your interest in these advertisements as you stated it to the meeting at Fremont, one of not having the advertisements contain anything that would produce conflict between the state and national banks?

Mr. Flansburg: Objected to as assuming a fact not proved, not proper surrebuttal.

The Court: Overruled.

Exception.

A. The discussion along that line was prior to the meeting at Fremont.

423 Q. And when was that?

Mr. Flansburg: Object as not proper surrebuttal.

The Court: Sustained.

Exception.

4236 Q. What was your reason for being at Fremont when these advertisements were all considered?

Mr. Flansburg: Object as not proper surrebuttal.

The Court: Sustained.

Exception.

4237 Q. Now, following your estimate that you made to the bankers in January, 1925, was there a special condition that ensued in 1925 and recurred in 1926 that added largely [fol. 921] to those losses?

Mr. Flansburg: Object as not proper surrebuttal.

The Court: Sustained.

Exception.

4238 Q. What happened in 1925, if anything, that added largely to the estimate that you had made with respect to the liabilities against the Guaranty Fund?

Mr. Flansburg: Object as not surrebuttal.

The Court: Sustained.

Exception.

4239 Q. Was there a partial crop failure in Nebraska in 1925 that added largely to the estimate of the losses you had made on the particular banks and matters to which you had made the estimate?

Mr. Flansburg: Object as not proper surrebuttal.
The Court: Let him answer.

Exception.

A. There was a partial crop failure which influenced the losses increasingly.

4240 Q. Now, in 1926 was there an almost total crop failure over a large share of southern Nebraska which added radically to the estimate of losses that you had made on the particular banks?

Mr. Flansburg: Objected to as leading, assuming a fact not proved and not proper surrebuttal.
The Court: He may answer.

Exception.

A. The same as that in 1925 would apply to 1926.

Mr. Abbott: That is all.

[fol. 922] Cross-examination.

By Mr. Flansburg:

4241 Q. At the time you made this statement in January, 1925, that there was six millions of liabilities against the Fund you also made the statement there were four million assets, did you not?

A. I intended to give them the net losses.

4242 Q. Mr. Griggs, did you not make a speech in October, 1925, to the state bankers association in which you stated the deficit in the Guaranty Fund was only two million dollars and that the state would be cleaned up in two years?

A. I made a statement that with the whole-hearted cooperation of all members of the Guaranty Fund Commission that the situation in Nebraska could be cleared up in two years. I don't remember what I said but if I said anything—I can positively state that I never said the loss was only two million dollars.

4243 Q. Now, Mr. Griggs, I will ask you if in that speech

you didn't say that the liabilities against the Guaranty Fund were approximately six million dollars and that there were assets that could be applied to those liabilities and after the application the deficit would be around two million, three hundred thousand dollars?

A. No, I did not.

4244 Q. You did not make that statement?

A. I am positive I did not.

4245 Q. And did you say the deficit would not exceed three mililon?

A. No.

[fol. 923] 4246 Q. Do you have the publications of the Nebraska State Bankers Association?

A. No, I do not have them.

4247 Q. Do you have a copy of that speech?

A. I wouldn't say for sure.

4248 Q. Can you produce it?

A. I can if I have it. I can produce a paper right now.

4249 Q. I am asking you about this speech.

A. This speech is in it.

4250 Q. Will you produce it?

A. Yes, sir. (Witness does so.)

4251 Q. You do not have any paper with you giving the full text of your speech made on that occasion?

A. No, I haven't. I haven't read that; unless it is there I don't know where it would be. I never retain any of them personally. I may have the full text of my speech somewhere in my correspondence.

4252 Q. But not with you?

A. Not with me.

Mr. Flansburg: That is all.

Redirect examination.

By Mr. Abbott:

4253 Q. You furnished counsel here the newspaper account of the speech?

A. Yes, I think the most part of it. I haven't read it, I don't remember just how much there is of it there.

Mr. Abbott: That is all.

[fol. 924] By Mr. Abbott:

4254 Q. And how much did you give the net loss as?
A. Between six and seven million.

By Mr. Flansburg:

4255 Q. Will you furnish me a copy of that speech?
A. If I have it I will.

Witness excused.

Mr. Hotz: Intervenors ask Mr. Marshall, considering that he was requested on his direct examination by intervenors to supply the record.

Mr. Payson D. Marshall, recalled for further direct examination by the intervenors, having been previously sworn, testified as follows:

By Mr. Hotz:

4256 Q. Mr. Marshall, have you figured the amount of Receivers' Certificates that were issued in 1923 and 1924 as shown by the books and records of your Department?
A. Yes, sir.

Mr. Flansburg: Objected to as not surrebuttal.
The Court: He may answer.

Exception.

A. I have had it figured.
4257 Q. What are those amounts?
A. The total Receivers' Certificates issued during the [fol. 925] year 1923 as shown by the books of the Department is $1,709,552.41. For the year 1924 the total is $2,305,776.93.

4258 Q. Now, can you give us the compilations of the assessments for 1921, 1922, 1923 and 1924, between what was given on Exhibit No. 44 and the full amount of the assessment, if the full amount had been levied?

Mr. Flansburg: Objected to as immaterial.
The Court: He may answer.

Exception.

A. Yes.

4289 Q. Give it, please.

A. For the year 1921 that amount is $503,778.78. The amount for 1922 is $435,808.64. For 1923, $777,848.25. For 1924, $503,733.68. That is all, according to my computation.

4260 Q. Calling attention to Exhibit 62, did you compile that or was it compiled under your direction from records in your Department?

A. No.

Surrebuttal

Examined by Mr. Abbott for the defendants on surrebuttal:

4261 Q. Referring to the examiners' reports that you examined and from which you produced the totals you have heretofore testified to on behalf of the plaintiffs as to worthless paper and paper upon which there was a probable loss, did you at the same time that you prepared that list and [fol. 926] that compilation make a record of the date of the examiners' reports from which you obtained the data?

A. Yes.

4262 Q. Now, you may give me the earliest period of examiners' reports that you examined?

Mr. Flansburg: Objected to as not proper surrebuttal; it is proper cross examination.

Mr. Sorenson: If that is the case we will ask to reopen the case and let this evidence in.

The Court: Overruled.

Exception.

A. There were a few in 1927.

4263 Q. How many?

A. Sixteen.

4264 Q. How many examiners' reports of examinations made the first three months of 1928?

A. Eighty-four.

4265 Q. How many in the second three months of 1928?

A. One hundred eighty-nine.

4266 Q. How many in the third three months of 1928?

A. Two hundred thirty-two.

4267 Q. How many in the fourth three months?

A. One hundred seventy-seven.

4268 Q. How many in 1929?

A. Twenty-five.

4269 Q. Mr. Marshall, since you were on the witness stand before have you made an examination of the correspondence in your office as between that Department and these banks with respect to these examiners' reports and the items referred to?

[fol. 927] Mr. Flansburg: Objected to as not proper surrebuttal.

The Court: It is not offered as surrebuttal. This is reserved, as I understand it. Objection overruled.

Exception.

A. Do you mean all the banks?

4270 Q. No, generally.

A. Yes, a partial examination.

4271 Q. Now, those reports and letters come under your Department, do they?

A. Yes, sir.

4272 Q. But the letters themselves, largely, are written by Mr. Bliss?

A. Yes, sir.

Mr. Abbott: That is all.

Witness excused.

[fol. 928] Mr. Clarence G. Bliss, called by the defendants in surrebuttal, having been previously sworn, testified as follows:

By Mr. Abbott:

4273 Q. You have been in the court room, Mr. Bliss, and heard the testimony of Mr. Marshall with respect to the examiners' reports he examined and from which he compiled the figures of the examiners' estimate of worthless paper and probable loss on paper?

A. Yes, sir.

4274 Q. Now, you have heard his testimony, have you, with respect to the periods during which those examiners' reports came in?

A. Yes, sir.

4275 Q. Now, following the receipt of those examiners' reports and about the dates of the reports, did you do anything with reference to the particular reports and the items referred to?

A. Yes, sir.

4276 Q. What did you do?

A. We either received a report from the banks that they—(interrupted).

4277 Q. State just what you did and what the banks did.

Mr. Flansburg: Objected to as not proper surrebuttal.

The Court: He may answer.

Exception.

A. We had some controversy with the banks as to those items—(interrupted).

Mr. Flansburg: Move to strike out as the witness' con-
[fol. 929] clusion "as to controversy with the banks."

The Court: Sustained.

Exception.

4278 Q. Try to state it, Mr. Bliss, without drawing conclusions, just state what you did and what the banks did.

A. The banks' reports—(interrupted).

Mr. Flansburg: Object to his testifying to any reports unless they are here.

Mr. Abbott: Withdraw the question.

4279 Q. Can you state from your personal knowledge and independent of the records what was done as between you and the banks following the receipt by you of the examiners' reports and as of about the date of the several reports?

A. Yes, sir.

4280 Q. Now, you may go on and state.

A. Each of those reports as they come in from the examiners regarding the bank, provide for a later report to be made by the bank. A bank makes a later report and if they don't do that, then we call them into a conference and arrange for the handling of those items.

4281 Q. And is that what you have done in connection with these items?

Mr. Flansburg: Object as calling for the witness' conclusion.

The Court: Overruled.

Exception.

A. Yes, sir, so far as the reports have come in since the examinations.

4282 Q. And have there been conferences with the bankers with respect to those items?

[fol. 930] A. Yes, sir.

4283 Q. You may state the facts within your personal knowledge as to the position of the banks generally with respect to them?

Mr. Flansburg: Objected to as calling for a surmise.

Mr. Abbott: Strike it out.

4284 Q. Now, commencing back in the early part of 1928 and with reference to the reports that had theretofore come in in 1927 and continuing down to date, have the last reports been taken up with the banks?

A. Yes, with the exception of the last few that have come in.

4285 Q. Excepting the last few. Have there been conferences through that period with the banks with respect to the reports?

A. Yes, sir.

4286 Q. And in those conferences have there been adjustments as between you and the banks as to items contained in the examiners' reports, whereby the same were eliminated as not within the classification placed on them?

Mr. Flansburg: Objected to as incompetent, irrelevant and immaterial, no sufficient foundation laid, not proper surrebuttal, calling for the conclusion of the witness.

The Court: It isn't offered as surrebuttal as I understand it. Overrule the objection.

Exception.

A. Yes, there have been adjustments, the banks have——

Mr. Flansburg: Object, move to strike out after the [fol. 931] word "adjustments".

The Court: Sustained.

Exception.

4287 Q. And have there been removed from those items during that period by payment and by security, those objectionable items?

A. Yes, sir.

4288 Q. Now, have you made a calculation as to the approximate amount of the items classified as worthless and probable loss that were removed from the banks, either by payment or by removal or by adjustment prior to the commencement of this suit?

Mr. Flansburg: Objected to as entirely immaterial.

The Court: Overruled.

Exception.

A. I have made an estimate.

4289 Q. Yes, and you may state that estimate, Mr. Bliss.

Mr. Sidner: Before the estimate is made I ask leave to cross examine on foundation.

The Court: Go ahead.

By Mr. Sidner:

4290 Q. What did you make your estimate from?

A. Just the number of these banks that come in during the year.

4291 Q. How many banks do you examine.

A. Of the seuven hundred twenty-six?

4292 Q. As a basis for your estimate, how many did you examine?

A. We checked up two-thirds.

4293 Q. From what did you check?

[fol. 932] A. From the reports in our files.

4294 Q. You mean the reports after the examiners' reports come in?

A. Yes.

4295 Q. Where are those reports?

A. In the office.

4296 Q. Do you have them with you?
A. No, they are in the office.

Mr. Sidner: We object as no foundation laid unless the reports are produced as a basis of cross examination.
The Court: Sustained.

Exception.

By Mr. Abbott:

4297 Q. Now, Mr. Bliss, you I believe testified you took care of this proceeding?
A. Yes, I hold these conferences with the banks.
4298 Q. And some of it was by oral conference there in your office?
A. Practically all of it.
4299 Q. Practically all of it. Was some of it by oral reports or was it all in writing?
A. The banks always report in writing what they have done, what they have accomplished.
4300 Q. Does this data to which you refer cover a voluminous amount of correspondence?
A. An immense amount of correspondence.
4301 Q. It is correspondence you handle personally and are generally familiar with?
A. I regard it as very confidential with the banks.
— — And from your personal knowledge and independent of any reference to this record, are you able to state the [fol. 933] approximate amount and percentage of these two items they classify as worthless and probable loss that have been disposed in the *the* manner I have indicated?
A. I can make my own personal estimate, that is the best I can say.
4302 Q. You may state.

Mr. Sidner: Object as no foundation laid and calling for speculation. No examination shown of the voluminous correspondence for the purpose of estimating how much.
The Court: Sustained.

Exception.

Mr. Abbott: We offer to prove by the witness on the stand that of the approximately four millions that was esti-

mated as worthless and as probable loss by the examiners that more than one-third of it was either paid, secured, or determined by the Department not to be worthless or a probable loss and prior to the commencement of this suit and that we had determinations made throughout the period from the commencement of the examiners' reports down to January 1, 1929.

Mr. Sidner: We make the same objection, no foundation laid, the offer being broader than the question.

The Court: Sustained.

Exception.

4303 Q. Mr. Bliss, did you hear Mr. Stephens testify here day before yesterday in which he stated you said to him if the special assessments continued you would have two-[fol. 934] thirds of the banks on your hands?

Mr. Sidner: Object as this witness testified on direct examination and we asked him nothing on cross examination.

No ruling.

Mr. Abbott: We offer in evidence as surrebuttal in connection with Mr. Schantz' testimony as to the per cent of net loss to gross earnings that portion of Exhibit No. 56 marked with a lead pencil and a cross immediately below the portion offered in evidence by Mr. Gaines and showing the average for all the national banks in the United States with respect to the same period and matters he offered in the same exhibit.

Mr. Sidner: Object as not proper surrebuttal.

Mr. Abbott: I don't believe it is a part of surrebuttal, it probably should be offered as a part of our case in chief.

Mr. Sidner: Objected to as being no part of their case in chief.

The Court: Overrule the objection and let it go in as a part of the case in chief.

Exception.

Mr. Abbott: And from the same Exhibit No. 56 we offer in evidence the part enclosed in lead pencil and marked with a capital "A" together with the heading thereof

showing the per cent net additions to profits, to capital and surplus of the national banks in Nebraska, Lincoln and [fol. 935] Omaha for the years 1921 to 1928, inclusive, and being the same years covered by Plaintiffs' offer of this same exhibit.

Mr. Sidner: Object as incompetent, irrelevant and immaterial.

The Court: Overruled.

Exception.

Exhibit No. 56 received in evidence, is attached to and made a part of this Bill of Exceptions, appearing at page 910 hereof.

Mr. Abbott: We also offer in evidence Exhibit No. 61 being an abstract of the reports of the banks as of June 30, 1928, the end of the eighteen months' period to which other Exhibits offered by all parties to this case apply.

Mr. Sidner: Objected to as incompetent, irrelevant and immaterial, no foundation laid. Objected to on every ground at this stage.

4303 Q. Mr. Bliss, calling attention to Exhibit No. 61 you may state whether or not that was prepared by your office?

A. Yes, sir.

4305 Q. And is that one of the files of your office?

A. Yes, sir.

4306 Q. And is that a correct abstract of the reports of the commercial and savings banks of the state of Nebraska at the close of business June 30, 1928?

A. Yes, sir.

Mr. Abbott: We now offer it in evidence.

Mr. Sidner: Objected to as incompetent, irrelevant and [fol. 936] immaterial.

The Court: Overruled.

Exception.

Exhibit No. 61 received in evidence, is attached to and made a part of this Bill of Exceptions, appearing at page 937 hereof.

4307 Q. Calling your attention to Exhibit No. 62 you may state, if you know, whether that is a correct list of the banks

operated by the Commission as of January 16, 1929, the date taken over by your department, the town and the bank?

A. It is a list of the banks now operated by the commission, that were turned over to them.

4308 Q. That is a correct list of the banks not in receivership?

A. Yes, sir, as shown by our office.

Mr. Abbott: We offer Exhibit No. 62 in evidence.

Mr. Sidner: Object as entirely immaterial, the list of these banks.

The Court: Overruled.

Exception.

Exhibit No. 62 received in evidence, is attached to and made a part of this Bill of Exceptions, appearing at page 938 hereof.

Witness excused.

[fols. 937-938a] Exhibit No. 61 Received in Evidence

Abstract of the Reports of the Commercial and Savings Banks of the State of Nebraska at the Close of Business June 30, 1928, 746 Banks Reporting

Resources

Loans and Discounts	$179,157,398.62
Overdrafts	378,847.39
Bonds and Securities	37,185,289.64
Judgments and Claims	975,256.24
Banking House, Furniture & Fixtures	6,321,305.03
Other Real Estate	10,168,629.15
Due From Banks	45,939,037.45
Cash	10,032,930.99
Bankers' Conservation Fund	541,046.36
Lawful Reserve with Federal Reserve Bank or other reserve agents	237,401.07
Current Expenses, Taxes and Interest Paid	115,080.02
Total	$291,052,221.96

Liabilities

Capital Stock		19,432,000.00
Surplus Fund		6,125,967.13
Undivided Profits		2,477,824.01
Dividends Unpaid		26,357.89
Individual Deposits Subject to Check	$103,468,448.49	
Demand Certificates of Deposit	8,670,790.62	
Time Certificates of Deposit	119,871,752.96	
Savings Deposits	19,121,634.10	
Due to Banks	9,928,772.95	
		261,061,399.12
Notes and Bills Rediscounted		315,124.95
Bills Payable		1,529,328.73
Depositors' Guarantee Fund		84,220.13
Total		$291,052,221.96

Reserve, 21%.

[fol. 939] Mr. Payson D. Marshall, called by the defendants for further surrebuttal examination, having been previously sworn, testified as follows:

Direct examination.

By Mr. Abbott:

4309 Q. Mr. Marshall, after Mr. Schantz testified here yesterday did you and several men in your Department make an examination of the reports of the Comptroller and prepare a statement giving certain data with respect to the percentage of losses of banks?

A. Yes.

4310 Q. What years did you examine the Comptroller's reports with respect to that, Mr. Marshall?

A. 1919, 1920, 1921, 1922, 1924, 1925, 1926, 1927 and 1928.

4311 Q. And is this Exhibit 63 a correct abstract of the Comptroller's reports as to the data recited hereon?

A. I believe it is correct.

4312 Q. Yes. It was made by you and your assistants, was it?

A. Yes.

4313 Q. Now, take the last two columns, that is the last column of dates apply only to the column next to it?

A. Yes, the column at the left of it.

4314 Q. And the remainder of the page covers the other years given, does it?

A. The years at the left side of the page.

Mr. Abbott: We offer in evidence Exhibit No. 63.

Mr. Sidner: As far as it applies to the whole United States it is not proper surrebuttal. We simply examined [fols. 940 & 941] on the Kansas City District and Nebraska.

Mr. Abbott: Then we offer it as part of our case in chief.

The Court: It is accepted.

Exception.

Exhibit No. 63 received in evidence, is attached to and made a part of this Bill of Exceptions, appearing at page 941 hereof.

Witness excused.

[fols. 942-945] Mr. Clarence G. Bliss, recalled by the defendants for further direct examination in surrebuttal, having been previously sworn, testified as follows:

By Mr. Abbott:

Q. Mr. Bliss, you heard Mr. Stephens' testimony here day before yesterday as to some date upon which he stated you said to him "If the special assessments continued you would have two thirds of the banks on your hands"; do you recall that?

A. I heard his statement.

Q. Did you ever make that statement to Mr. Stephens, in substance or in fact?

A. No, sir.

Witness excused.

Defendants rest.

Testimony closed.

[fol. 946] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed Mar. 18, 1930

Comes now the appellant in the above entitled cause and adopts its assignment of errors as its statement of points to be relied upon, and represents that the whole of the record, as filed, is necessary for the consideration of the case, with the exceptions as noted below, and that the entire record should be printed by the Clerk except for the following omissions:

Volume 2

Omit all of Exhibit 2 except the title page thereof and the last 3 lines of page 50 and all of page 51.

Omit all of Exhibit 5 except the title page and the 4th line to and inclusive of the 14th line on page 4 and the last paragraph on page 12.

Omit all of Exhibit 9.

Omit all of Exhibit 11 except the first 3 lines on page 19, [fol. 947] and except lines 17 to 21 inclusive on page 80, and except the first paragraph on page 98, and except the last paragraph on page 99 and the first 2 lines on page 100.

Omit all of Exhibit 12.

Omit all of page 199 to page 203 inclusive, and omit the first 13 lines on page 204.

Omit all of page 239 and page 239a.

Omit all of Exhibit 28 of Exhibit No. 13, shown on page 266.

Omit all of Exhibit 29 of Exhibit No. 13 shown on page 267.

Omit all of Exhibit 30 of Exhibit No. 13 shown on page 268.

Omit all of Exhibits 31 and 32 of Exhibit No. 13 shown on page 269.

Omit all of Exhibit 33 of Exhibit No. 13 shown on pages 270 and 270a.

Omit all of Volume 2 subsequent to page 270a.

Volume 3

Omit all of Volume 3 down to page 281.

Omit the last 9 lines on page 382, and from thence on to the words "Dan V. Stephens" on page 388.

Omit Exhibit "B" of Exhibit 17 shown on page 392.

Omit Exhibit "C" of Exhibit 17 shown on page 393.

Omit Exhibit "E" of Exhibit 17 shown on page 406.

Omit Exhibit "A" of Exhibit 17 shown on page 412.

Omit all of pages 432 to and inclusive of page 432d.

Omit Exhibit "I" of Exhibit 17 shown on page 433.

[fol. 948] Omit all of pages 433a to and inclusive of page 435b.

Omit all of page 440 after the first 9 lines.

Omit all of Exhibits N 1, N 2, N 3, N 4, N 5 and N 6 shown on pages 441 to 446 inclusive.

Omit the exhibits on pages 447, 449 and 450.

Omit the first 9 lines of page 451.

Omit all of pages 453, 454, 456, 457, 458, 460, 461, 462 and 468.

Omit all of page 469 except the last 7 lines.

Omit Exhibit "O" on page 471.

Omit the first 6 lines on page 472.

Omit Exhibit "P" on page 474.

Omit page 490 and page 518.

Omit page 583 to and inclusive of 583ww.

Omit all exhibits on pages 586 and 587.

Omit all of pages 589 and 589a and Exhibit 36 on page 590.

Omit all of pages 601 and 602 and the first 10 lines on page 603.

Omit pages 604 to 608 inclusive.

Omit all of Volume 3 subsequent to page 610.

Volume 4

Omit all of the first part of Volume 4 down to and including page 620a.

Omit the last 14 lines on page 636.

Omit all of page 637, except the last 4 lines.

Omit all of pages 683, 684, 684a, 702 and 703.

Omit pages 724 to 3nd inclusive of 724ff.

[fol. 949] Omit Exhibit 50 on page 727.

Omit all of page 799 after the first 14 lines.

Omit all of page 800 after the first 10 lines.

Omit all of page 801 after the first 15 lines except print the last 2 lines.

Omit all of page 802 after the first 8 lines.

Omit the last 5 lines of page 811.

Omit pages 812 and 813.

Omit Exhibit 54 on page 820.

Omit all after the first 11 lines on page 866 to and including the first 19 lines on page 870.

Omit all of page 871 except the first 2 lines.

Omit the first 15 lines on page 872.

Omit the last 7 lines on page 878 and the first 10 lines on page 879.

Omit the last 13 lines on page 886.

Omit the first 5 lines on page 887.

Omit exhibits on pages 910, 911 and 912.

Omit all of page 933 after the first 6 lines.

Omit page 934.

Omit the first 18 lines on page 935.

Omit Exhibit 62 on page 938.

Omit Exhibit 63 on page 941.

Omit all of pages 943, 944 and 945.

Frank H. Gaines, Howard A. Flansburg, S. S. Sidner, Counsel for Appellant.

[fol. 950] STATE OF NEBRASKA,
Lancaster County, ss:

I, the undersigned, attorney for defendants and appellees in the above entitled matter, hereby acknowledge receipt of a copy of statement of points and designation of portions of record to be printed, and acknowledge the service of the same upon me this 13th day of March, 1930.

C. A. Sorensen, Attorney for Defendants and Appellees and for Willis M. Stebbins, Intervenor.

The undersigned acknowledge receipt of copy and due service of statement of points and designation of portions of record to be printed on this 13th day of March, 1930, and enter appearance for the parties represented by them.

Clinton J. Campbell, William J. Hotz, Attorneys for Mary E. Gandy, James H. Covey, Theodore H. Buelt, Huffman & Seymour, Inc. (a Corporation), Leonard N. Seymour, John Halbur, and Frank A. Hebenstreit.

[fol. 951] The undersigned acknowledge receipt of copy and due service of statement of points and designation of portions of record to be printed on this 13th day of March, 1930, and enter appearance for the parties represented by them.

Roper & Fuller, Attorneys for Frank Palmer, James M. Stephens, Robert L. Brown, Laura A. Smith, Fred Woodruff, Burr R. Stroman, Matta Palmer, Blanche Modlin, J. J. Brown, Executor of the Last Will and Testament of William R. Brown, Deceased; Lillian W. Palmer, Arthur M. Smith, Trustee; James D. Wolfe, John D. Modlin, Catherine L. Stroman, and Osa Stephens.

The undersigned acknowledge receipt of copy and due service of statement of points and designation of portions of record to be printed on this 13th day of March, 1930, and enter appearance for the parties represented by them.

W. L. Cropper, W. W. Wenstrand, W. L. Donovan, Attorneys for Edward Lincoln, George W. Harding, and Henry M. Lubbe.

[fol. 952] [File endorsement omitted.]

[fol. 953] SUPREME COURT OF THE UNITED STATES

DESIGNATION OF ADDITIONAL PARTS OF THE RECORD TO BE PRINTED—Filed Mar. 29, 1930

Comes now the appellees in the above entitled cause and ask that there be included in the record to be printed by the Clerk the following additional portions thereof (so far as the same pertains to Exhibits being almost wholly additional portions of particular Exhibits asked to be printed by appellant;) please print:

Volume 2

Print pages 48 and 49, and all of page 50 except the last 3 lines, of Exhibit 2 page 66.

Print that part of Exhibit 5, page 68, after the title page to-wit: "the last 9 lines of page 1 and all of page- 2 and 3."

Volume 3

Print pages 453, 454, 456, 457, 458, 459, 460, 461, 468.
Print the first page of Exhibit 36 page 590.
Print pages 604, 605, 606, 607, 608.

Volume 4

Print the last 14 lines of page 636.
Print all of page 637.
Print the last 7 lines of page 878 and the first 10 lines on page 879.
[fol. 954] Print the last 13 lines on page 886 except the last 4.
Print all of page 933 after the first 6 lines.
Print all of page 934.
Print the first 18 lines of page 935.

C. A. Sorensen, Chas. E. Abbott, Attorneys for Appellees.

The undersigned acknowledge receipt of copy of Designation of Additional Portion of Record to be Printed on this 28th day of March, 1930.

—— ——, Attorneys for Appellants.

[fol. 955] [File endorsement omitted.]

Endorsement on cover: File No. 34,881. Nebraska Supreme Court. Term No. 750. Abie State Bank, appellant, vs. Arthur J. Weaver, as Governor of the State of Nebraska; Clarence G. Bliss, as Secretary of the Department of Trade and Commerce; Willis M. Stebbins, as Treasurer, etc., et al. Filed March 18, 1930. File No. 34,881.

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Number [redacted] 63

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1929.

ABIE STATE BANK, ABIE, NEBRASKA,
APPELLANT,

V.

ARTHUR J. WEAVER, AS GOVERNOR OF THE STATE OF NEBRASKA, AND CLARENCE G. BLISS, AS SECRETARY OF THE DEPARTMENT OF TRADE AND COMMERCE, APPELLEES.

ON APPEAL FROM THE SUPREME COURT OF NEBRASKA.

STATEMENT BY APPELLANTS OF GROUNDS OF JURISDICTION IN COMPLIANCE WITH RULE TWELVE OF THE SUPREME COURT OF THE UNITED STATES.

FRANK H. GAINES,
LEONARD A. FLANSBURG,
S. S. SIDNER,
Attorneys for Appellant.

WEILBRENNER-BRINEMAN CO., Law Briefs, Lincoln, Neb.

Number 750

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1929.

ABIE STATE BANK, ABIE, NEBRASKA,
APPELLANT,

V.

ARTHUR J. WEAVER, AS GOVERNOR OF THE STATE OF NEBRASKA, AND CLARENCE G. BLISS, AS SECRETARY OF THE DEPARTMENT OF TRADE AND COMMERCE, APPELLEES.

ON APPEAL FROM THE SUPREME COURT OF NEBRASKA.

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FRANK H. GAINES,
LEONARD A. FLANSBURG,
S. S. SIDNER,
Attorneys for Appellant.

May It Please The Honorable Court:

This suit was instituted by the Abie State Bank, plaintiff, on behalf of itself and 558 other state banks, all chartered under the laws of the state of Nebraska, to en-

join the defendants, Arthur J. Weaver, governor of the state of Nebraska, and Clarence G. Bliss, secretary of the Department of Trade and Commerce of the state of Nebraska, from collecting special assessments, levied and to be levied, against these banks under the bank guarantee law of the state of Nebraska (R., Vol. 1, pp. 3-9).

Suit was brought in a state court, the District Court of Lancaster County, Nebraska (R., Vol. 1, p. 3).

The plaintiffs below, the appellants here, in their petition challenged the constitutionality, under the Constitution of the United States, of the statutes of Nebraska authorizing the levy of such special assessments. The statute complained of is Section 8028, Compiled Statutes of Nebraska 1922, as amended by Section 26, Chapter 191, Laws of 1923, which reads as follows (R., Vol. 1, p. 78):

> "If the depositors' guarantee fund shall, from any cause, be depleted or reduced to any amount less than one per cent of the average daily deposits as shown by the last semi-annual assessment statement thereof filed, the department of trade and commerce shall levy a special assessment against the capital stock of the corporations governed by the provisions of this article, to cover such deficiency, which special assessment shall be based on the said average daily deposits, and, when required for the purpose of immediate payment to depositors, said special assessment may be for any amount not exceeding one per cent of said average daily deposits for the year 1923 and thereafter not exceeding one-half of one per cent of said average daily deposits in any one year."

The plaintiff's petition (R., Vol. 1, pp. 3-9) declared that the guarantee fund accumulated under the bank guarantee law of the state of Nebraska, had not only been completely exhausted but that liabilities against the fund

exceeded the assets available for the fund by the amount of $16,000,000.00, and that to compel further assessments against the existing banks destroyed their own resources and weakened the security for their own depositors, and that the operation of the law could no longer be justified as bearing any rational relation to a public purpose, and was, in fact, destroying protection to depositors rather than providing protection.

The petition further declared that the plaintiff banks were unable to make compensatory earnings upon their capital and pay such assessments, and that the assessments were confiscatory of their earnings and destructive of the banks; that the special assessments, by reason of the insolvent condition of the bank guarantee fund, had become regular, and that the total yearly tax under the guarantee law against the banks amounted to a rate of 8 per cent upon their capital.

The special assessment due at the time the suit was brought amounted to over $620,000.00, and subsequent assessments, levied each six months thereafter and covered in this litigation, now altogether total more than $3,000,000 (R., Vol. 1, p. 61).

The total capital of the existing state banks in Nebraska was, at the time of the commencement of the suit, $19,000,000.00 (R., Vol. 1, p. 61).

Since 1919 the state banks have paid into the guarantee fund $14,000,000.00 (R., Vol. 1, p. 80), and yet the fund was completely exhausted and stood with a deficit of about $16,000,000.00. For two years prior to the commencement of this suit two-thirds had been unable to pay dividends.

The petition further declared that a large majority of the banks, 110 in number, had been chartered prior to the passage of the bank guaranty law, and had, prior to that time, invested in properties peculiarly fitted for banking purposes and which depended largely for their value upon the continuance of such use, and that the value of such properties would be in great part destroyed in case of a discontinuance by those institutions of the banking business, individuals being prohibited from doing a banking business in the state, and the plaintiffs by their petition declared that the operation of the law was not justified under the police power in its operation, bore no rational relation to any public purpose, and was confiscatory of the properties and earnings of the banks, took their properties and earnings without due process of law, and was "illegal, unjust and confiscatory and unconstitutional and in violation of the Fifth Amendment of the Constitution of the United States and in violation of the Fourteenth Amendment of the Constitution of the United States" (R. Vol. 1, p. 7).

Upon a trial in the district court that court found that the statute complained of was unconstitutional and in violation of the Federal Constitution and granted an injunction against the collection of all future special assessments. In the opinion filed by that court the court said (R. Vol. 1, p. 68):

> "Now the only possible purpose in levying special assessments under the Guaranty Fund Law is to pay depositors in failed banks whose claims have already been adjudicated. Present day depositors cannot possibly receive any benefit therefrom. Such a situation was not in the mind of Justice Holmes when he wrote the opinion sustaining the constitutionality of the law. He justified an 'insignificant taking' on

> the ground that the banks, by contributing to the Depositors Guaranty Fund, would create a condition that would make the currency of checks secure, would make safe the resort of depositors to state banks and would make failures almost impossible. Of course, he could not then foresee the great war or the accompanying inflation which followed, or the reaction that followed the later curtailment of credits. The Guaranty Fund Law as conceived by Justice Holmes is no longer serving its purposes."

And in an extended analysis of the evidence, that court further pointed out that the assessments were confiscatory, prevented compensatory returns, and took the earnings and properties of the banks for private use and without due process of law (R., Vol. 1, p. 68).

In the decree entered by the district court, the court further found (R., Vol. 1, pp. 51-52):

> "That the burden of paying such assessments by the state banks, instead of strengthening the state banking system and protecting depositors of state banks, has just the contrary effect, and, to the extent of the burden imposed by such assessments, makes said banks less able to meet the demands of their current depositors and less able to keep their banks solvent; that the said special assessment is not now being levied for any public purpose, but is being levied for the sole and only purpose of paying claims of depositors in failed banks, which claims have been allowed, and will not and cannot be used for the purpose of creating a fund for the stabilizing of banking conditions in the State of Nebraska.
>
> "The court further finds that the levy and collection of such special assessment specifically complained of in the plaintiff's petition, is unreasonable, unjust, oppressive and confiscatory and not, under present conditions, a proper exercise of nor justified by the police power of the state, and that the provision of

> Section 8028, Compiled Statutes 1922, providing for such special assessments, is, under the facts and conditions shown to exist in this case, unreasonable, unjust, oppressive and confiscatory and void and unconstitutional, and in violation of the 5th Amendment of the Constitution of the United States and of the 14th Amendment of the Constitution of the United States, in that it deprives the plaintiff, Abie State Bank, and the state banks on behalf of whom this suit is brought, of their property without due process of law, and denies them the equal protection of the law."

On appeal to the Supreme Court of Nebraska, filed on May 31, 1929 (R., Vol. 1, p. 2), that court being the highest court, and the court of last resort, in that state, the decision of the trial court was reversed, upon the sole ground that the statute was not unconstitutional, and that the assessments did not constitute the taking of private property without due process of law, the judgment of the Supreme Court reciting (R., Vol. 1, p. 75):

> "This cause coming on to be heard upon appeal from the district court of Lancaster County, was argued by counsel and submitted to the court; upon due consideration whereof, the court finds error apparent in the record of the proceedings and judgment of said district court in that, contrary to the findings of that court, the levy of a special assessment upon the state banks pursuant to the provisions of Section 8028, Compiled Statutes 1922, as amended by Section 26, Chapter 191, Laws of 1923, does not constitute the taking of private property without due process of law. It is, therefore, considered, ordered and adjudged that the temporary injunction granted herein by said district court be, and hereby is, dissolved, the judgment is reversed and the action is hereby dismissed."

In the opinion of the Supreme Court of Nebraska, the court, recognizing the confiscatory character of the tax and giving no heed to changed conditions, nevertheless held that it was bound by the former decisions of the Supreme Court of the United States in *Noble Bank* v. *Haskell*, and companion cases, the court in its opinion saying (R., Vol. 1, pp. 82-83):

> "In the present case, the trial court found that the guaranty fund was confiscatory, and that its enforcement constituted the taking of private property without due process, and that there should therefore be an indefinite abatement of the enforcement of the act until such time as such enforcement could be made without mischievous consequences. It may be observed, however, that the bank guaranty fund law has been held by the highest court in the land to be a constitutional act and well within the meaning of the federal Constitution.
>
> "Substantially like questions as here involved were considered and decisions were rendered by the Supreme Court of the United States in *Noble State Bank* v. *Haskell*, 219 U. S. 104, and *Assaria State Bank* v. *Dolley*, 219 U. S. 121, and in both cases it was held that the act was not repugnant to the provisions of the Constitution."

In the fourth syllabus of the opinion of the Supreme Court of Nebraska the law was declared to be constitutional in the following language (R., Vol. 1, p. 77):

> "Where a special assessment has been levied upon the state banks pursuant to the provisions of Section 8028, Comp. St. 1922, as amended by Section 26, Ch. 131, Laws of 1923, such assessment does not constitute the taking of private property without due process."

It may be contended that the Supreme Court of Nebraska based its decision in part upon the proposition that the banks had waived their right to raise the constitutional question. Such a proposition is not mentioned in the judgment of the court just referred to. The body of the court's opinion, likewise, does not so hold nor declare, but the third syllabus of the court's opinion reads as follows (R., Vol. 1, p. 77):

> "Where a state bank has accepted the benefits arising from the deposits of money pursuant to the terms of the bank depositors' guaranty law, such bank should not be heard, in a proper case, to make complaint of a special assessment upon such deposits which has been levied for the benefit of the depositors' guaranty fund."

In answer to that contention we will urge:

I.

The judgment of the Supreme Court of Nebraska (R. Vol. 1, p. 75), above quoted, which controls the opinion, shows that the sole ground of the decision of the court was that the law was not unconstitutional.

II

A great majority of the banks, 110 in number of the complaining banks, had received charters and were operating before the enactment of the bank guaranty law; they had no election by which they could come under the law or stay from under it when it was enacted, and their compelled operation under the law could not work a waiver of their rights.

Union Pacific R. Co. v. Public Service Commission, 63 L. Ed. 131, 248 U. S. 67.

Ward v. Love County, 64 L. Ed. 751, 253 U. S. 17.

Western Union Tel. Co. v. State of Kansas, 54 L. Ed. 355, 216 U. S. 1. (See Justice White's concurring opinion.)

III.

To hold that the banks had waived their rights would be a holding palpably unfounded by the record, and that question is resolved as a matter of law, since the testimony on that subject is without material conflict.

IV.

The Supreme Court of Nebraska in its opinion refers to the newspaper advertising of the guarantee fund law by the banks. The material for such advertising was furnished to the newspapers by the Department of Trade and Commerce of the State of Nebraska (R., Vol. 2, p. 212, Q. 1109), and it was the finding of the district court, unquestioned by the supreme court, that (R., Vol. 1, p. 66):

> "They (the banks) contend that when they were stressing the advantages of that law they did not know the actual conditions of the state banks. That undoubtedly was true."

V.

The case is one which deserves to be heard on the merits.

The Baltimore & Ohio R. R. Co. v. State of Maryland, 20 Wall. 643, 22 L. Ed. 446.

The Supreme Court of Nebraska considered and determined the constitutionality of the Nebraska statute, and by its decision, entered on December 7, 1929 (R., Vol. 1, p. 75), the constitutionality thereof was sustained.

Motion for rehearing was filed on January 10, 1930, within the time allowed, and this motion overruled on January 18, 1930, and a rehearing denied (R., Vol. 1, p. 87).

Final judgment, by such ruling, was entered against plaintiffs below, and appellants here, on January 18, 1930.

Petition for order allowing appeal was filed with the Supreme Court on February 13, 1930 (R., Vol. 1, p. 90), together with assignments of error, setting forth, on the several grounds hereinbefore mentioned, that the statute complained of and the special assessments provided for were unconstitutional and in violation of the Fourteenth Amendment to the Constitution of the United States, and constituted the taking of property of the plaintiff banks without due process of law.

The Chief Justice of the Supreme Court of Nebraska, by order duly entered, allowed an appeal to the Supreme Court of the United States on February 13, 1930 (R., Vol. 1, pp. 96, 98).

Order for appeal was also procured and entered on February 13, 1930, through the clerk of the District Court of the United States for the District of Nebraska (R., Vol. 1, pp. 100-101).

Citation, addressed to all of the parties in the case, was issued and service of same and the entrance of appearance of all of such parties acknowledged by signature upon such citation, the citation being returned and filed February 19, 1930 (R., Vol. 1, pp. 103, 104, 105).

Bond for appeal was given, duly approved and filed with the Supreme Court of the State of Nebraska, in com-

pliance with the order of that court (R., Vol. 1, pp. 107-108).

Praecipe for the making and transmission of the record to the Supreme Court of the United States was duly served and filed on February 19, 1930 (R., Vol. 1, pp. 112-115).

The case was docketed in this Court on March 18, 1930.

The constitutional question was made the basis of the plaintiff's petition, attacking the bank guarantee law statute referred to. The judgment sought to be reversed is a final one by the Supreme Court of Nebraska, which is the court of last resort in that state. The validity of the Nebraska statute was directly challenged by the proper procedure as violating the Fifth and Fourteenth Amendments of the Constitution of the United States, and as operating to take the property of the plaintiff banks without due process of law. The Supreme Court of Nebraska has decided that constitutional question in favor of the statute.

The jurisdiction of this Honorable Court is claimed under Section 237a (U. S. C. A. Sec. 344a) of the Judicial Code as amended by the Act of February 13, 1925.

The right of appeal is justified under Title 28, Sections 861a and 861b U. S. C. A., being Sections of the Judicial Code as amended by Acts of January 31, 1928, and April 26, 1928, and the appeal is supported by the following decisions:

Nashville, C. & St. L. Ry. v. *White*, 278 U. S. 456, 73 L. Ed. 452.

Great Northern R. Co. v. *State of Minnesota*, 278 U. S. 503, 73 L. Ed. 477.

The Supreme Court of Nebraska expressly overruled appellants' claim of unconstitutionality, and by its opinion and judgment actually enforced and applied said state statute under attack against the appellants (R., Vol. 1, p. 75). The validity of this statute is therefore subject to attack here.

Fiske v. *Kansas,* 274 U. S. 380, 71 L. Ed. 1108.

The constitutional question was raised as soon as possible, being the basis of and expressly set forth in the plaintiff's petition (R., Vol. 1, p. 7). This constitutional question was expressly ruled upon by the district court (R., Vol. 1, pp. 50, 52), and was again affirmatively passed upon by the supreme court and made the sole ground for its judgment and reversal of the case, as shown by its judgment and journal entry (R., Vol. 1, p. 75). This complied in full with the requirements of law as announced in *Mellon* v. *O'Neil,* 275 U. S. 212, 72 L. Ed. 245.

It is respectfully submitted that this Court has jurisdiction of this cause on appeal.

Copy of this statement has been served upon adversary counsel and proof of such service filed with the Clerk of this Court.

Respectfully submitted,

ABIE STATE BANK,

For itself and in behalf of all banks for whom this suit was brought.

By .....

.....

.....

Attorneys.

FILE COPY

Office Supreme Court
SEP 30

No. 34881

—o—

In the Supreme Court of the United States

—o—

OCTOBER TERM, 1930.

—o—

No. 63

—o—

ABIE STATE BANK, *Appellant,*

vs.

ARTHUR J. WEAVER AS GOVERNOR OF THE STATE OF NEBRASKA; CLARENCE G. BLISS AS SECRETARY OF THE DEPARTMENT OF TRADE AND COMMERCE, *Appellees;*

WILLIS M. STEBBINS AS TREASURER OF THE STATE OF NEBRASKA, *Appellee;*

MARY E. GANDY, JAMES H. COVEY, THEODORE H. BUELT, HUFFMAN & SEYMOUR, INC. (A CORPORATION), LEONARD N. SEYMOUR, JOHN HALBUR AND FRANK N. HEBENSTREIT, *Appellees.*

—o—

RESISTANCE TO MOTION OF INTERVENERS

—o—

F. H. Gaines,
Leonard A. Flansburg,
S. S. Sidner,
Attorneys for Appellant.

Cockle Printing Co., Law Briefs, Omaha

No. 34881

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In the Supreme Court of the United States

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—o—

RESISTANCE TO MOTION OF INTERVENERS FOR WRIT OF CERTIORARI AND SUGGESTION OF DIMINUTION OF THE RECORD

—o—

The cross-petitions of the interveners were dismissed by the decree of the District Court (Tr. of Rec., Page 41), and there is no mention of the interveners in

the judgment of the Supreme Court nor in the opinion in said case. The interveners are depositors in banks which have failed. Their rights are not different from those of hundreds of similar depositors. The issues raised by them are the same as those presented by the defendant. The omission from the record of the petitions of intervention and supporting evidence accordingly was proper. The citation in usual form was served on each of the interveners (Orig. Tr. of Rec., Page 193). The praecipe for Transcript of Record was served on Attorney General Sorensen, Attorney for Willis Stebbins on February 13, 1930, and Mr. Campbell, Attorney for other interveners on February 14, 1930 (Tr. of Rec., Page 7), and statement of points to be relied upon and designation of parts of record to be printed was served March 13, 1930 (Tr. of Rec., Page 669). No objections were made by interveners or appellees to such omissions. At this late date they should not be heard to complain, as the brief of appellant is in the printer's hands.

WHEREFORE, the appellant respectfully asks that the motion for a writ of certiorari be overruled and suggestion of the diminution of the record be denied.

ABIE STATE BANK, ABIE NEBRASKA, *Appellant.*

By F. H. GAINES,

LEONARD A. FLANSBURG,

S. S. SIDNER,

FILE COPY

Office Supreme Court, U. S.
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OCT 3 1930
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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1930.

No. 63.

ABIE STATE BANK, APPELLANT,

V.

ARTHUR J. WEAVER, AS GOVERNOR OF THE STATE OF NEBRASKA; CLARENCE G. BLISS, AS SECRETARY OF THE DEPARTMENT OF TRADE AND COMMERCE; WILLIS M. STEBBINS, AS TREASURER, ETC., ET AL.

APPEAL FROM SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF OF APPELLANTS.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1930.

No. 63.

ABIE STATE BANK, APPELLANT,

v.

ARTHUR J. WEAVER, AS GOVERNOR OF THE STATE OF NEBRASKA; CLARENCE G. BLISS, AS SECRETARY OF THE DEPARTMENT OF TRADE AND COMMERCE; WILLIS M. STEBBINS, AS TREASURER, ETC., ET AL.

APPEAL FROM SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF OF APPELLANTS.

FRANK H. GAINES,
LEONARD A. FLANSBURG,
S. S. SIDNER,
Attorneys for Appellants.

(34,881)

REPORT OF OPINION OF LOWER COURT.

The opinion of the Supreme Court of Nebraska, upon which the judgment sought to be reversed here is based, is found reported in 227 N. W. 922, 119 Neb. 153.

GROUNDS OF JURISDICTION.

The grounds of jurisdiction of this court have been heretofore set forth by separate printed statement filed herein in compliance with paragraph 1 of Rule 12, and are therefore not restated.

SUMMARY STATEMENT OF THE CASE.

This suit was instituted on December 31, 1928, by the Abie State Bank, plaintiff, on behalf of itself and 558 other state banks, all chartered under the laws of the State of Nebraska, to enjoin the defendants, Arthur J. Weaver, governor of the State of Nebraska, and Clarence G. Bliss, secretary of the Department of Trade and Commerce of the State of Nebraska, from collecting special assessments, levied and to be levied, against these banks under the bank Guaranty Law of the State of Nebraska (Rec. pp. 1-21 incl.). The plaintiffs below, the appellants here, in their petition challenged the constitutionality of the statutes of Nebraska, authorizing the levy of such special assessments, under the Fourteenth Amendment of the Constitution of the United States, on the ground that the collection of such assessments constituted the taking of their property by the state without due process of law.

Suit was brought in a state court, the District Court of Lancaster County, Nebraska, where the case was decided in favor of the plaintiffs and an injunction granted. Upon appeal to the Supreme Court of the State of Nebraska that decision was reversed, the injunction ordered dissolved, and from the latter decision appeal is taken here. The total amount of assessments, the collection of which has been prevented by this suit, now amounts to about $4,000,000.00.

The defendant state officers were attempting to collect these assessments under what is known as the Bank Guaranty Law of the State of Nebraska. By the statute state banks were declared to be quasi public institutions. Sec. 7983, Comp. St. of Neb. 1922. Under this law all state banks were subjected to assessment, the proceeds to go into a common fund, and the fund to be used for the payment of the depositors in those banks which should fail, where the assets of the failing banks were insufficient to satisfy in full the claims of their depositors.

The Bank Guaranty Law, enacted in the year 1909, provided that (Sec. 8024, Comp. Stat. Neb. 1922; Laws 1909, p. 87):

> "For the purpose of providing a guarantee fund for the protection of depositors in banks, every corporation engaged in the business of banking under the laws of this state, shall be subject to assessment to be levied, kept, collected and applied as hereinafter provided."

By Section 8025 the banks were required to report to the Department of Trade and Commerce their average daily deposits for each preceding six-months period.

By Section 8026 the Department of Trade and Commerce was required twice each year to levy upon each bank an assessment, each time in the amount of one-twentieth of one per cent of the average daily deposits so reported.

By the provisions of the law (Section 8029, Comp. Stat. Neb. 1922) a failure to pay the assessments authorized the Attorney General to have a receiver appointed. By the amendment of the law in 1925 (Session Laws 1925, Chapter 30, page 122) a failure to comply

with the order of the department authorized the department to take possession of the property and business of the bank and place it in charge of the Guaranty Fund Commission.

By Sections 8031-8033, inclusive, the law provided that in case a bank failed it should be placed in receivership, and the assets of the bank applied to the payment of depositors, and, where insufficient, the court should determine the amount of the deficiency and order the Department of Trade and Commerce to draw against the depositors' guaranty fund in the amount required to make up the deficiency. Claims of depositors are paid according to priority of adjudication.

Prior to the commencement of the suit there were approximately $10,000,000.00 of such adjudicated claims, bearing interest at seven per cent per annum, ordered paid out of the Guaranty Fund. The fund itself was not only exhausted but, with the claims of other depositors against the fund, there was a deficit therein of some $16,000,000.00.

Under the operation of the Guaranty Fund Law, and since 1920, 292 banks had failed prior to the commencement of this suit, the number of failures constantly increasing each year.

By Section 8027 it was provided that when the Guaranty Fund should reach the total of one and one-half per cent of the average daily deposits, all assessments should cease until the fund was depleted below one per cent of such average daily deposits.

By Section 8028, Comp. Stat. 1922, as amended by Section 26, Chapter 191, Laws of 1923, p. 452, it was provided:

> "If the Depositors' Guarantee Fund shall, from any cause, be depleted or reduced to any amount less than one per cent of the average daily deposits * * * the Department of Trade and Commerce shall levy a special assessment * * * not exceeding one-half of one per cent of said average daily deposits in any one year."

The Department of Trade and Commerce, under the authority of Section 8028, last above quoted, the Guaranty Fund not only being completely gone but there being a huge deficit to meet, on December 15, 1928, levied a semi-annual assessment against all the complainant banks of one-fourth of one per cent, such additional semi-annual assessments having also been made regularly for several years past. The result was that the total assessment against each of these banks had become an annual charge in the amount of six-tenths of one per cent of their total average daily deposits. This assessment was at the rate of eight per cent per annum upon the total capital of the banks.

This suit was brought by the plaintiff banks to enjoin the defendant officers from collecting, or attempting to collect, these assessments, or any future assessments thereafter to be levied, on the ground that the law under which such assessments were levied was unconstitutional.

Without setting forth with particularity the issues, the gist of the case, presented by the pleadings (Rec. pp. 1-38, incl.) is as follows:

At the time of the commencement of this suit there were 726 state banks, doing business in Nebraska and

subject to assessment. The charters of 410 of these banks had been granted and such banks had been operating a banking business prior to the enactment, in 1909, of the Bank Guaranty Law. The total capital stock of the 726 existing state banks at the time of the commencement of this suit was approximately $19,000,000.00. The total Guaranty Fund assessment, by reason of special assessments regularly levied, in the aggregate amounts to eight per cent per annum upon that capital. During the period of ten years prior to the commencement of the suit, in addition to what had previously been paid out, the state banks paid into the Guaranty Fund $14,609,000.00. The total paid into the Guaranty Fund was $16,709,842.11. Depositors in failed banks, up to the time of the commencement of this suit, have had the benefit of these current contributions; and yet the fund stood, at the time of the commencement of this suit, with a deficit of $16,000,000.00, which deficit was continually growing in size. The total annual increased assessments against the banks had at last become no more than sufficient to pay the annual interest accruing on the accumulated claims of depositors of failed banks.

Not only was the Guaranty Fund gone, with no hope of replenishment, but the banks themselves, except for a few of the stronger banks, by reason in large part of the burden of these assessments, had their resources depleted to the extent that they could no longer suffer the burden of assessment and continue to do business. Their earnings were insufficient to pay these assessments and to take care of their own operating expenses and meet their own losses, and leave a compensatory return on their investments. For two years prior to the commencement of this suit two-thirds of the banks in the state had been unable to earn or pay dividends. The

burden of assessments did not permit them a compensatory return upon their investments and was confiscatory of their earnings. Those banks chartered prior to 1909, when the bank Guaranty Law was enacted, as well as those banks chartered after its enactment, had, on the strength of their charters, invested in banking buildings and equipment, peculiarly fitted for a banking business, and they could not cease operation of that business without losing in large part the value of those investments. Individuals were prohibited from engaging in such business. None of these banks when chartered, whether chartered before or after the enactment of the law, though, of course, knowing they were subject to reasonable police regulation, could contemplate for the future such unreasonable and burdensome assessments.

The plaintiffs' contention is two-fold:

1. That under these conditions the current assessments against the banks, which deplete their own funds and are used, not for the benefit of their own depositors, but to pay the claims of depositors in banks which had long since failed, now serve no public purpose and bear no rational relation to any public purpose, for the collection of those assessments takes away from the security of present depositors in going banks to pay the depositors in failed banks, and without hope or tendency of furnishing protection to present depositors. Instead of the assessment creating a fund and affording protection to the depositors in going banks, as was its purpose, it directly defeats that object. The operation of the law is injurious to the existing banks and to the protection of their depositors, without benefit or hope of benefit to either, and since it bears no rational relation to their furtherance and welfare, it serves no public

purpose, but benefits only private and individual claimants, and cannot now be justified as a proper police regulation.

2. The assessments, if upheld at all, must be upheld as against all of the banks or none, since they are all brought into a common scheme. 410 of these banks were operating prior to the enactment of this law, their investments were made, and they had no election but to operate under the law or suffer the loss of investments. That is also true of those which were chartered later. The tax, as a police regulation, is unreasonable in that it is oppressive, burdensome, exorbitant and results in confiscation of the earnings and properties of the banks. Though we concede the banks must operate subject to reasonable police regulation, this regulation is now unreasonable.

The defendants, appellees here, aside from denials of plaintiffs' allegations, contend that the decision of this court in the cases of *Noble State Bank* v. *Haskell*, 219 U. S. 104, 55 L. ed. 112, and *Shallenberger* v. *First State Bank of Holstein*, 219 U. S. 114, 55 L. ed. 117, are decisive of the issues here and are *res adjudicata* of the questions involved.

The case of *Shallenberger* v. *First State Bank of Holstein*, was the case brought in behalf of the Nebraska banks in the first instance, in 1909, attacking the validity of the Bank Guaranty Law, and the decision in that case was rendered upon the strength of the decision in *Noble State Bank* v. *Haskell*.

The decisions in those cases, it is our contention, were rendered upon a basis of the supposed operation of the law and prior to experience under it, and we contend

the questions of confiscation and the questions of unreasonableness of operation, arising under present conditions, were not and could not have been passed upon in those cases at that time.

The defendants, and appellees here, further contend that the banks, by operation under the law and by advertising the benefits of the law have waived, or are estopped to raise the question of constitutionality.

As to the matter of waiver of rights, the opinion of the Supreme Court of Nebraska is not clear and definite. But what is said about waiver in the opinion is entirely disregarded in the *judgment* entered by the court, and in that judgment the *sole ground* of decision was the question of constitutionality of the law (Rec. p. 58). The judgment of the court controls the opinion.

It is further our contention that a holding that the banks were estopped or had waived their rights is palpably unfounded by the record, both in fact and law. Since the testimony on that subject is without material conflict, the question is resolved entirely as a matter of law.

If the statement in the opinion of the Supreme Court of Nebraska on the question of waiver is taken to mean that the banks in this case have waived their rights, then that conclusion is clearly unfounded and erroneous, upon the undisputed facts in the record, for the reasons that the banks had no election, that their operation under the law was compulsory, that the publicity they gave to the fact that their deposits were protected by the Guaranty Fund of the State of Nebraska were such as the law *expressly* directed they should make, and that the newspaper advertisements of the benefits of the Bank

Guaranty Law were initiated, sponsored and recommended by the state departments, and the material that went into those advertisements was furnished by those departments. Those advertisements were made in 1926, concededly prior to any knowledge on the part of the banks of any serious condition as to the Guaranty Fund.

THE FINDINGS OF FACT BY THE TRIAL COURT HAVE NOT BEEN CRITICIZED NOR MODIFIED BY THE SUPREME COURT OF NEBRASKA IN ITS OPINION, BUT HAVE BEEN INFERENTIALLY ACCEPTED, AND THOSE FINDINGS STILL STAND AS THE UNDISPUTED JUDICIAL FINDINGS OF THE FACTS IN THE CASE.

The record is composed of practically undisputed facts. Upon this record the trial court, the District Court of Lancaster County, Nebraska, made extensive findings of fact and drew its conclusions of law. The Supreme Court of Nebraska has not questioned the findings of fact of the District Court, but drew different conclusions of law. The findings of fact made by the District Court are not only supported by the record, but stand undisputed, uncriticized and unmodified as the record of facts in this case.

The Supreme Court of Nebraska in its opinion does not discuss the confiscatory character of the assessment, nor the question of whether or not the assessment, under present conditions, is unreasonable and serves no public purpose, but passes those questions of fact as if conceding them, and holds that, *nevertheless*, the case is controlled as a matter of law by the former decisions of the Supreme Court of the United States in the cases passing on the Bank Guaranty Law, heretofore referred to.

The only reference made by the Supreme Court of Nebraska in its opinion to the question of confiscation or unreasonableness of the Bank Guaranty Law as a police regulation is as follows (Rec. p. 63):

> "In the present case, the trial court found that the guaranty fund was confiscatory, and that its enforcement constituted the taking of private property without due process, and that there should therefore be an indefinite abatement of the enforcement of the act until such time as such enforcement could be made without mischievous consequences. It may be observed, *however*, that the bank guaranty fund law has been held by the highest court in the land to be a constitutional act and well within the meaning of the federal Constitution.
>
> "Substantially like questions as here involved were considered and decisions were rendered by the Supreme Court of the United States in *Noble State Bank* v. *Haskell*, 219 U. S. 104, and *Assaria State Bank* v. *Dolley*, 219 U. S. 121, and in both cases it was held that the act was not repugnant to the provisions of the Constitution."

The Supreme Court of Nebraska thus entirely ignored and gave no heed to the change of conditions which had come about through operation under the law during the twenty years which has elapsed since the decision on the Bank Guaranty Law by the Supreme Court of the United States. These changed conditions were the gist of our action. If it had not been for changed conditions, conditions, in fact, diametrically opposed to the conditions upon which the decision of the Supreme Court of the United States was based, this suit would not have been brought.

The trial judge, after three weeks' trial and after listening to all of the evidence, made a full and careful

analysis of the evidence and extensive findings of fact. They are embodied in his memorandum opinion (Rec. p. 41), and decree (Rec. p. 39). These were not criticized but inferentially accepted by the Supreme Court.

In the findings set forth in the memorandum opinion, which are incorporated in the court's decree by reference (See *Rosaly* v. *Graham Y. Frazer*, 227 U. S. 584, 57 L. ed 655), the trial court, referring to an extensive table of figures on earnings of the banks in 1927 and 1928 declared (Rec. pp. 44, 45, 46, 50):

> "The significant thing in these figures is that *compensatory* net earnings are confined to a *minority* of the banks. Thus, 176 banks, or 24.24 per cent of the total number earned $1,475,056.50 which was 76.21 per cent of the total earnings of all banks. Hence, less than a fourth earned three-fourths of the total earnings. On the other hand, 156 banks or 21.48 per cent of the total number showed a loss of $558,799.54 and 110 banks, or 56.47 per cent of the total number not only were earnings less than six per cent per annum on their combined capital and surplus as of June 30, 1928, but also show their earnings in the red in the sum of $179,170.79.
>
> "The Department of Trade and Commerce prepared an analysis of operating expense and income of 845 state banks for the fiscal year ending June 30, 1926. This analysis classifies the banks according to capitalization which enables us to locate in a general way the banks with the least earnings; the two groups, one consisting of 206 banks with a capital of from ten to twenty thousand dollars showed a net profit on capital and surplus of 4.17 per cent, while 426 banks with a capital of from twenty to forty thousand dollars showed a net profit of 4.95 per cent. Thus both these classes show earnings of less than 5 per cent. On the other hand, 177 banks

with a capital of from forty to seventy-five thousand dollars earned 6.28 per cent; eighteen banks with a capital of seventy-five to a hundred thousand, 5.90 per cent, while another eighteen banks with a capital of from one hundred to two hundred thousand dollars earned 11.45 per cent. The net profits on capital and surplus for the entire 845 banks was (on an average) 5.924 per cent. It is clear from this table that the smaller banks, which by law must be located in the smaller places, are the ones that are least able to meet the strenuous situation that is being experienced. * * *

"The evidence introduced in this case quite clearly demonstrates that fully two-thirds of the banks under the existing financial conditions are unable, after paying assessments amounting to 8 per cent on their capital, to pay compensatory dividends. The Guaranty Fund Law cannot continue to function except upon the basis of all going state banks meeting its demands. It is based upon mutuality, the co-operation of all. Such banks as cannot respond to those demands must fall by the wayside. How far can this process of elimination be carried without violating the constitutional guaranties against taking private property for private use without compensation?"

These book earnings, as the trial court indicates and as the record discloses, are in fact greater than actual net earnings, for the banks have been unable to charge off losses which would have wiped out earnings, and have been compelled, in an attempt at collection of loans due them, to take real estate, usually on second mortgage, until, at the time this suit was brought, almost $10,000,000 of their capital was represented by such real estate securities, actually representing in large part losses that the banks could not charge off. With reference to this the trial court says (Rec. pp. 45-46):

"Under the heading 'Other Real Estate Owned' the aggregate had increased from $818,514.10 in 1920 to $9,872,647.21 in 1928 * * *; the latter item (Other Real Estate Owned) clearly indicates that there is a large amount of additional assets that should be charged off. It is not a healthy condition to have more than one-third of the banks' capital invested in the frozen assets, 'Other Real Estate.' If the banks had not been required to pay the special assessments they would have been able to charge off part or all of this 'Other Real Estate."

With regard to what dividends the banks have paid, the court said (Rec. p. 49):

"From Exhibit 37, which is the Defendants' compilation relating to 726 banks for eighteen months ending June 30, 1928, we learn something of the dividends paid. This Exhibit is based upon the figures relating to the banks that had survived and is practically the list today of the going banks. From this Exhibit we learn that only 273 banks, or 37.6 per cent of the total number, paid a dividend in 1928 (let us insert here the other 63 per cent paid no dividend in that year nor since); that 124 paid their last dividend in 1927; 30 in 1926; 20 in 1925; 11 in 1924; 9 in 1923; 14 in 1922; 42 in 1921 and 43 in 1920; while 30 reported, paid no dividend since prior to 1920. These figures are somewhat incomplete because 130 do not state when their last dividend was paid. However, it is pretty safe to say that if they had paid any dividend recently they would have reported the fact."

With reference to the *total* amount of yearly assessment the court declared (Rec. p. 48):

"From the figures furnished us by the Department of Trade and Commerce we learn that the total assessments levied upon the 726 banks for the year

1928 amounted to $1,508,360.36. This is almost exactly 8 per cent of the banks' capitalization, which was $19,001,000."

In the court's decree (Rec. p. 39), as to the confiscatory character of the assessments, the court found:

"The court further finds that the special assessment levied against the plaintiff banks under the provisions of Section 8028, Compiled Statutes 1922, which levy was made on December 15, 1928, and which the defendants were taking steps to collect, and that each of the special assessments provided for by said section of the statutes, is, under the facts and conditions shown by the evidence in this case, unjust, oppressive, unreasonable in amount and confiscatory of the earnings and property of the plaintiff bank and of the banks in behalf of whom this suit is brought, as is more particularly shown by the facts, conditions, findings and conclusions set forth in the memorandum opinion filed herein."

With reference to the holding that the assessments no longer served a public purpose, gave no protection to present depositors and, instead of carrying out, defeated the original purpose of the act, the court in its memorandum opinion made findings as follows (Rec. pp. 56-57):

"The total liabilities of the failed banks are $26,400,282.76. The Commission expects to realize out of the assets of these banks $10,451,932.65. Therefore, the deficit is $15,948,350.11. * * *

"The foregoing figures do not take into consideration the condition of the going banks which was discussed in the earlier part of this memorandum. It is quite evident from that discussion that unless some relief is granted the Guaranty Fund, this deficit of fifteen millions plus will be increased rather than decreased, even though all assessments now provided by law are continued indefinitely. We

certainly can expect when the real condition of the Guaranty Fund is known to the depositing public that deposits in state banks will diminish just as they have increased under the more favorable conditions in the past. This in turn will result in lessened returns to that fund.

"The Guaranty Fund, under the conditions existing, is no protection to the present day depositors. As a matter of fact, it is a burden to the banks and just to the extent of that burden makes them less able to meet the demands of their current depositors by keeping their banks solvent."

And in the decree on that subject, the court made the following finding (Rec. pp. 39-40):

"The court further finds, as is more particularly set forth in said memorandum opinion, that owing to the condition of the Guaranty Fund and the fact that there is a deficit in said fund of near $16,000,000.00, that the depositors in existing banks, and the existing and operating banks themselves, now receive no benefit from the payment of such assessments, but that the payment of such assessments must be used to pay, and will be insufficient to meet, the said deficit which now exists in said Guaranty Fund, and that the burden of paying such assessments by the state banks, instead of strengthening the state banking system and protecting depositors of state banks, has just the contrary effect, and, to the extent of the burden imposed by such assessments, makes said banks less able to meet the demands of their current depositors and less able to keep their banks solvent; that the said special assessment is not now being levied for any public purpose, but is being levied for the sole and only purpose of paying claims of depositors in failed banks, which claims have been allowed, and will not and cannot be used for the purpose of creating

a fund for the stabilizing of banking conditions in the State of Nebraska."

None of the foregoing findings of fact are disputed or modified by the Supreme Court in its opinion. The only answer by that court was that this case is controlled by the former decision of the Supreme Court of the United States.

SUMMARY OF THE EVIDENCE, SHOWING THE CONDITION OF THE BANKS, THE CONFISCATORY CHARACTER OF THE ASSESSMENTS AND THE UNREASONABLE OPERATION OF THE LAW UNDER PRESENT CONDITIONS.

Present Status of the Guaranty Fund and Past Contributions by the Banks.

Mr. Van E. Peterson, secretary of the Guaranty Fund Commission, in charge of the files and records of that office, testified that the amount of adjudicated and unadjudicated claims on December 31, 1928, the date this suit was commenced, was $26,400,282.76 (Rec. p. 90, Q. 81); that the value of the assets in the hands of the Commission from failed banks was $10,451,932.65; leaving a deficit in the Guaranty Fund of $15,948,350.11 (Rec. p. 92, Q. 95). Adjudicated claims at that time amounted to $10,536,518.59, and these claims drew interest at 7 per cent from date of adjudication. It is obvious that with accumulated interest the deficit in the Guaranty Fund at the time of the commencement of the suit exceeded $16,000,000.00. Each additional bank failure adds to that deficit. Banks have not been closed until hopelessly insolvent. According to the experience of the Commission (Rec. p. 93, Qs. 99-102) the deficit

is increased by an amount each time of six times the capital stock of the bank that fails.

During the period of operation under the law 292 banks had failed prior to the commencement of the suit. Bank failures have increased each year, and year by year. There were 21 failures in 1922; 24 in 1923; 19 in 1924; 38 in 1925; 36 in 1926; 41 in 1927; 57 in 1928, and failures are continuing. Though it is outside the record, there were 77 failure in 1929 and 26 the first six months of 1930. By reason of the large number of banks that have failed since the commencement of the suit, the deficit has been very largely increased.

The total contribution by the banks to the Guaranty Fund up to the time of the commencement of the suit was $16,709,842.11. Of this amount $14,609,576.65 has been contributed since 1919 (Rec., Exhibit 10, p. 422). State banks have also, in addition to this, contributed to the bankers' conservation fund, for the benefit of the Guaranty Fund, the amount of $541,046.36 (Rec. Exhibit 61, p. 664).

During a period of enormous stress placed upon these banks, requiring their utmost endeavors to keep their own banks open and to protect their own depositors, they have been compelled to contribute these huge amounts to other failed banks.

Condition of the State Banks.

The beginning of the present crisis commenced with the period of general deflation of property values, beginning in about 1920.

In 1920 (Rec. p. 242, Q. 1245) live stock values had dropped 50 per cent; corn, which had been $1.60 to $1.75 a bushel, dropped to 20 cents a bushel; wheat, which

had been $2.00 a bushel, dropped to 60 cents a bushel. Real estate values also suffered a decline although this decline was not immediately felt. The effect of the decline in real estate has continued down to the present time. In fact, the effects of general deflation are still continuing. The testimony of Mr. Bliss, secretary of the Department of Trade and Commerce, was (Rec. p. 200, Qs. 948-949):

948 Q. "You have spoken here of the deflation period?"

A. "I would make that since 1920."

949 Q. "Including the present time?"

A. "Yes, covering the time clear down."

The loss of property values was necessarily reflected in the assets of the banks, in the collateral securing their loans and in other assets held for the protection of depositors. It was a condition for which the banks were not, and could not, have been responsible. Business and properties throughout the state suffered a loss in like character and amount. The loss to depositors is a loss which reflects a cross section loss to every property owner in the state. The farmers lost the equivalent in the value of their cattle and hogs, grain and lands. The depositors lost in the same manner through shrinkage of bank assets. The loss to each was from the same primary cause. Mr. Woods, testifying for the state as an expert, said (Rec. p. 244, Qs. 1252-1253):

1252 Q. "You have testified concerning conditions that affected real estate and other values; what effect did those conditions have on the banks during this period?"

A. "Are you speaking from 1920 to July 1, 1928?"

1253 Q. "Yes, as to the cause of failures and approximate losses?"

A. "Well, it was the last and final cause and the occasion of the greatest number of bank failures the state has ever suffered from. There were other contributing causes, such as individual incompetency and occasionally a betrayal of trust, but those were trivial as compared to the other conditions which caused nearly three hundred banks to fail in Nebraska."

He testified further that another bad condition was the fact that the state had granted charters to too many state bank (Rec. p. 273, Qs. 1415-1416):

1415 Q. "In your opinion, has the state as a whole been over-banked during the last five years?"

A. "Yes."

1416 Q. "It has. And in your opinion is it at the present time over-banked?"

A. "Yes, but not so much so because there has been quite a number of failures, though you can still find plenty of communities having too many banks."

The condition of the state being over-banked was a condition over which the bankers of the state had no control.

Existing Banks Unable To Charge Off Their Own Losses.

From the beginning of this deflation period, the state banks have continued to take losses. They have been unable to make earnings sufficient to pay the Guaranty Fund assessments and to meet the current losses as such losses were realized. As time went on it became necessary to take every character of security that a bank could get to protect its loans, sometimes second or third mortgages on real estate, since there was no other available security.

Mr. Van E. Peterson, secretary of the Guaranty Fund Commission, testified (Rec. pp. 105-106, Qs. 200-201):

200 Q. "Well, in connection with these bad debts arising through real estate and second mortgages you are familiar, from your experience with your Department, as to the circumstances under which the banks acquire that particular class of paper, generally speaking?"

A. "Yes, sir."

201 Q. "You may state what the facts are, in that connection."

A. "We usually find that before the deflation period set in a bank would be carrying a person for a line of indebtedness, sometimes secured and quite often unsecured. When the particular security became insufficient and property values as a whole depreciated, the banker would take any security he could get. Quite often that would be a second mortgage and quite often a third mortgage, to protect himself. Consequently they are not taken as security to the original loan but to the loan already made."

When the time came for the bank to call its mortgage due, money could not be realized to pay the notes from such properties. The banks were required to take over such real estate and hold the equity, which was subject to a first and perhaps a second mortgage, and set up that equity as of the value of the face of the notes secured, a largely fictitious value.

Although such real estate holdings are improper investments for a bank to make, because at the best they are frozen assets and of no immediately realizable value, the banks were forced into this situation.

It is interesting to compare their condition with regard to the real estate item as it existed in 1919, and as it existed at the commencement of this suit in 1928 (Rec. p. 422, Exhibit 10).

In 1919, 937 banks had "other real estate" on their books, valued at $641,450.88. In 1928, the number of banks had been reduced to 726; 137 of the original 937 banks were being operated by the Guaranty Fund Commission, and the other 74 banks had been closed. The 726 banks existing, at the time of the commencement of the suit, had on their books other real estate valued at $9,872,647.21, and the 137 operated by the Guaranty Fund Commission carried the item "Other Real Estate" at $5,879,043.60. It thus appears that, in 1928, 863 of the 937 banks operating in 1919 had a total of $15,751,690.81 carried under the item "Other Real Estate," as against an original $641,450.88 in 1919 for the total 937. The 726 existing banks now carry $9,872,647.21 under that item, "Other Real Estate," but in addition carry "real estate" for bank buildings at $6,174,432.86. The value of this latter item is obviously in large part dependent on ability to profitably continue in business.

In other words, at the time of the commencement of this suit the 726 banks had assets invested in real estate of $16,057,580.17. This value carried on the books was largely in excess of actual value.

Mr. Peterson, secretary of the Guaranty Fund Commission, has had an experience covering many years with the disposal and liquidation of such real estate assets, carried under the denomination of "Other Real Estate," and his experience is that on an average *not more than forty-three per cent* of the value carried on the books

can be realized. Mr. Peterson's testimony was (Rec. p. 116, Q. 285; p. 105, Qs. 194-196):

285 Q. "Now, on these failed banks that came into the control of the Guaranty Fund Commission, what has been the average amount realized from the liquidation of the real estate as compared to the amount at which it was carried?"

A. "Approximately 43 per cent."

194 Q. "To what extent does the item 'real estate' enter into it?"

A. "We have realized on practically four and a half millions of real estate, book value, since I have been in the office. The average book realization has been 42 per cent of the total of the book value."

195 Q. "And the book value, I take it, would be based on the value over and above any incumbrances there might be on it?"

A. "The book value represents the equity only, and it is 42 per cent on the value of that equity which we have realized."

196 Q. "In practically every instance where you have taken over failed banks the interest of the bank in real estate has been an equity, there has been a first mortgage ahead of it?"

A. "That is usually true."

Mr. George W. Woods, of the Lincoln State National Bank, testifying for the state as to the item of "Other Real Estate" said (Rec. pp. 268, 269, 271, Qs. 1386, 1387, 1403):

1386 Q. "Now, calling attention to the report of the same Department for the year, 1927, as of June 30th, that being the last, the item 'other real estate' $13,966,675.86. Note the figure June 30, 1927."

A. "I notice it."

1387 Q. "Does that show a healthy condition of the state banks in Nebraska, or otherwise, in your opinion?"

A. "Otherwise, I should say."

1403 Q. "Now, Mr. Woods, you said that the amount of real estate taken over has created an unhealthy condition. Was the taking over of that real estate the result of the deflation that you described, largely?"

A. "I think largely, yes. There were cases where it couldn't be ascribed to that, but I think largely so."

If the assets carried by the present banks as "Other Real Estate" which are at the best frozen assets, could be liquidated and bring what experience has shown has been the liquidating value of millions of dollars of such assets, 43 per cent on the record value of such properties, the loss in this book item alone would be $5,627,408.91

[redacted] full condition of these banks is not reflected in this one item alone although the one item is sufficient to emphatically indicate the true condition.

The item carried on the books of the banks as "Other Real Estate" to the extent of approximately $[illegible] graphically emphasizes losses which are covered up in such holdings which cannot be charged off.

Ivan V. Stephens, prominent state banker exceptionally well versed in banking conditions of the state testified in behalf of the plaintiffs (Rec. p. 324, Qs. 3294, 3295, 3300):

3294 Q. "And through that period the banks in Nebraska to your knowledge have been cleaning up in one way and another these frozen loans they acquired at that time?"

A. "Only the good banks have been able to do that."

3295 Q. "Well, all of the banks have to some extent?"

A. "I don't think so."

3300 Q. "And practically all of the banks have been making some clean up all the time?"

A. "No, my information is just the reverse,—that only about a third of the banks have been able to clean up their note cases. *The others have used up their earnings to pay the assessments in the Guaranty Fund.*"

The defendants, by Exhibit 37, show total net earnings of the banks for the *18 months period* prior to the commencement of the suit to be $1,935,519.40 (see summary Exhibit 52, Rec. p. 567).

But Mr. Marshall, a deputy of the secretary of the Department of Trade and Commerce, testified as to the necessity of charge-offs during that period, which would have wiped out entirely these total net earnings.

His testimony was that examiners' reports were received at various times throughout the year by the examiners as they examined the banks; some of these reports being given up to as late as the end of the year 1928 and the beginning of 1929, disclosed worthless assets in these banks of $1,001,074.42 (Rec. p. 556, Q. 3581), probable loss on notes, overdrafts, and such items, $2,948,878.10 (Rec. p. 556, Q. 3585); statutory bad debts, paper which has been carried by the banks more than six months after it is due, and demand paper carried by the banks more than a year after it is due, $1,062,625.08 (Rec. p. 557, Qs. 3591-3593). Were the banks able they should have charged off all of these items. This condition, as disclosed by the examiners'

reports, is not refuted in the record. Mr. Bliss offered to make an estimate, off-hand, as to how much, if any, of these amounts have been charged off or adjusted. The court did not allow him to do this without furnishing and definitely testifying from his records, and this, for some reason, he did not see fit to do (Rec. pp. 661-662, Qs. 4296-4303).

This amount does not include whatever charge-offs would be required as to $9,872,647.21 of "real estate" carried by the banks as capital assets, had the banks been able to meet those losses.

Capital Assessments of Stockholders.

The stockholders in 242 of the existing banks, in order to meet capital impairment, have contributed, through stockholders' assessments, the amount of $2,106,682.15 (Rec. p. 153, Q. 558; p. 187, Qs. 863-864).

Mr. Bliss, secretary of the Department of Trade and Commerce, gave this information through his testimony, and stated that there were 160 banks that he had not investigated on that question and did not know whether or not their stockholders had paid assessments to repair capital.

Net Earnings of the Banks Not Allowing for all Deductions to Meet Losses Which Should Be Charged Off.

Owing to the nature of the case it was necessary that such evidence as to the earnings and condition of the banks be used which was practicably available. An individual examination of each bank and banker in the state was prohibitive. Such a trial procedure would have taken years.

The banking department has, as to all these banks and as to each individual bank, information which it has gathered and accumulated from bank reports made under the requirements of the statutes and from its investigations and examinations of the books by bank examiners, and from special reports called for from the banks under authority of statutory power. All of which information has become a matter of official record in that office. From these records there is ample to show that the state banking system is in a critical condition and that the great mass of the state banks of Nebraska have not been able to pay Guaranty Fund assessments and make compensatory returns upon their capital investment.

The state banks are required each four months to publish a statement of their financial condition and to file copies of such published statements with the banking department. The banking department also has required the banks to file reports describing their condition, in answer to certain particular questions put to them. These recorded facts are on file with the secretary of the Department of Trade and Commerce. Statements furnished by the banks and published to the people naturally always put the banks in the most favorable light possible as to financial condition. Incapacity to earn, impairment of capital, valueless assets, are not heralded in such statements. It would be damaging to the bank making such disclosure.

The plaintiffs employed auditors to examine these records and they made a list of all banks earning less than 6 per cent for three consecutive 6 months periods in 1927 and 1928. Mr. Mooney, auditor, employed with

Walker & Fulk, public accountants of Lincoln, Nebraska, made up from these records Exhibits 6, 7 and 8.

His testimony from his examination was that during the period from January 1, 1928, to June 30, 1928 (Rec. p. 134, Q. 369) 353 of the 726 banks showed earnings to each of less than 6 per cent per annum (Rec. p. 135, Q. 380), and that the combined aggregate *net loss* of this class of banks was $356,076.18 (Rec. p. 137, Q. 391), and that these 353 banks contributed to the Guaranty Fund in assessments during that same period $301,006.98 (Rec. p. 137, Q. 392).

During the period from January 1, 1927, to June 30, 1927, he testified that there were 413 banks (Rec. p. 138, Qs. 395-397) of the 726 existing banks, each of which made less than 6 per cent per annum on its capital.

He further testified that, during the period from July 1, 1927, to December 31, 1927, of the 726 existing banks there were 376 (Rec. p. 139, Q. 407; p. 140, Q. 411), each of which received less than 6 per cent per annum earnings.

The defendants on their behalf introduced Exhibit 37, which covered data as to each of the 726 banks during the same 18 months period, taken from the same records of the Department of Trade and Commerce.

On behalf of the plaintiffs, Walker & Fulk, public accountants, made a summary of defendants' Exhibit 37, which is Exhibit 52 (Rec. p. 567).

By this showing it appears that each of 410 of the 726 banks had a net earning of less than 6 per cent per

annum, and that the aggregate total loss to these 410 banks was $179,170.79.

The summary of Exhibit 37, made by Mr. Fulk, shows that of the total earnings of all state banks in Nebraska, 48 banks of the 726, or a little over 6 per cent of the banks, made over 45 per cent of the earnings. It further appears that 176 of the 726 banks, or 24 per cent of the banks in the state, made 76 per cent of the earnings of all of the banks.

The defendants also introduced in evidence Exhibit 39 (Rec. p. 494), showing earnings of banks for the year ending June 30, 1926. By that showing, which covers 845 banks, it appears that 636 banks of the 845 made less than a 5 per cent per annum return (see columns 1 and 2 of the Exhibit).

Dividends Paid By the Banks.

Mr. Bliss, secretary of the Department of Trade and Commerce, testified that practically two-thirds of the banks had paid no dividends for two years prior to the commencement of the suit (Rec. p. 203, Qs. 971-974):

971 Q. "Do you know the number that paid dividends the past year?"
A. "Yes."

972 Q. "How many, don't cite the banks, just give the number."
A. "The number paying in 1928. One-third, not quite one-third."

973 Q. "Of what?"
A. "Of the banks paid dividends."

974 Q. "In 1927?"
A. "Just a fraction over one-third."

Of the two-thirds unable to pay dividends for those two years, 104 paid the last dividend in 1927; 30 in 1926; 20 in 1925; 11 in 1924; 9 in 1923; 14 in 1922; 12 in 1921; 43 in 1920; 30 paid their last dividend at some date prior to 1920, and the record does not disclose as to when the other 130 paid their last dividend.

Condition of Abie State Bank.

The name of Abie State Bank appears first as plaintiff since it was first in alphabetical order on the list.

The record shows the Abie State Bank was organized in 1904, prior to the enactment, in 1909, of the Bank Guaranty Law. Mr. Svoboda has been president of the bank for the last 17 years; part of the time he received $135.00 a month salary as president, most of the time he received $130.00. Certainly salaries were not excessive. In 1904 the bank was organized with a capital of $10,000.00. From earnings from 1910 to 1917, more than 12 years ago, the capital was increased to $15,000.00. In other words, $5,000.00 was added to the capital out of the earnings in 7 years, at the rate of about 7 per cent a year.

The earnings after that time, before paying losses, were as follows (Rec. p. 172, Qs. 712-718): 1922, $475.66; 1923, $315.72; 1924, $1,221.99; 1925, $1,942.32 (Rec. pp. 170-171, Q. 696); 1926, $1,245.51 (Rec. p. 171, Q. 697); 1927, $195.17 (Rec. p. 170, Q. 694), making a total of the earnings *without any deduction for losses* of the bank for these eight years at much less than 6 per cent on the capital investment.

In 1921 and in 1926 (Rec. p. 183, Q. 829) $500.00 each year has been added to the surplus. In 1926 a dividend

of $900.00, or 6 per cent, was paid; aside from this the balance of the earnings of the bank have been absorbed in losses and in payment of assessments to the Guaranty Fund.

All earnings from an insurance and land business, which is carried on by Mr. Svoboda, has been, during his connection with the bank, added to bank earnings. In 1926, when the $900.00 dividend was paid, $806.60 was received by the bank through land commissions and insurance business (Rec. p. 170, Q. 691; p. 169, Qs. 675-678).

In 1928 the net earnings of the bank were $333.05. However, during that year Mr. Svoboda turned in to the bank out of real estate commissions and insurance $587.61 (Rec. p. 169, Q. 683). Except for that earning, the year would have shown a loss of $254.56 on the bank business. $459.00 is also yet due on the assessment to the Guaranty Fund for that year, which if paid would leave the bank with a loss of $256.56 even when it counts in the $587.61 made from an insurance and land business.

During this 8 year period, after 1920, Mr. Svoboda testified the bank had been unable to meet its losses, because its earnings were insufficient; and had been unable to make the charge-offs required by the bank examiner (Rec. p. 179, Qs. 797-798):

> 797 Q. "Have you been able from your earnings to charge out all the paper the examiners requested?"
>
> A. "No, sir."
>
> 798 Q. "Why did you not charge out all that they asked you to?"
>
> A. "Because we didn't have enough profits to charge them off."

Mr. Svoboda testified that there were notes to the extent of $4,000.00 admittedly frozen assets, and upon which he had not even been collecting interest (Rec. p. 173, Q. 736). Also, that the bank held as assets an equity in real estate at $4,800.00, subject to first mortgage.

The deposits of this bank for the year were over $180,000.00, so that the assessments against the bank for the Guaranty Fund would amount to over $1,000.00 a year, an enormous charge to be exacted from such bank.

The Guaranty Fund assessment upon this bank was not only an enormously heavy charge, but what protection or benefit did the bank or its depositors now receive by the payment of such exaction? Over $1,000.00 a year, in other words, was taken away from the security of the depositors of that bank to go not to create a reserve or a fund for the protection of its own depositors, but to pay losses in banks that have failed long ago and where the claims, as adjudicated claims, were then of long standing. The assessments, since they amount to a complete loss to the Abie State Bank, tend to the extent of the assessment to decrease its assets and to that extent endanger the security of its depositors; and from this assessment it, and its depositors, receive absolutely nothing in return.

Oppressive Burden of Assessments.

The Guaranty Fund assessments of six-tenths of one per cent upon deposits, which has now become a regular yearly burden, amounts to a tax upon the banks of 8 per cent upon their capital. An 8 per cent tax is, under any circumstances, an enormous tax. Manifestly

the state banks of Nebraska, as a class, and especially the great majority, at least two-thirds of the banks in this state, are incapable of continuing as banks and at the same time contribute to the enormous assessments aggregating a million and a half of dollars a year to the Guaranty Fund.

The opinion of the secretary of the Department of Trade and Commerce, Mr. Bliss, was expressed that if the assessment was continued *two-thirds of the banks in the state would become insolvent and close.*

Mr. Schantz testified (Rec. p. 303, Q. 1639):

> 1639 Q. "Mr. Schantz, were you present with Mr. Dan Stephens at the office of Mr. Bliss, Secretary of the Department of Trade and Commerce, in the month of September of last year (September, 1928) and at that time in your presence and to you did Mr. Bliss make this statement, or this in substance: 'If the special assessments are continued it will result in practically two-thirds of the state banks of this state, the going concerns, being wiped out?'"
> A. "Yes."

This conversation was corroborated by the testimony of Mr. Dan Stephens (Rec. p. 307, Q. 1661).

Mr. Bliss did not deny making such a statement, but said (Rec. p. 210, Qs. 1050-1051):

> A. "I neither affirm or deny it. I don't recall it."
>
> 1051 Q. "If you did make it was that your opinion at that time?"
> A. "Yes."

Mr. Bliss admitted that in the conversation referred to he talked about the difficulties surrounding these banks.

Mr. Stephens, president of the Fremont State Bank, testified (Rec. pp. 522-523, Q. 3289):

> 3289 Q. "Now, Mr. Stephens, from your knowledge of the banking situation and from your experience in connection with the Guaranty Fund matters, and your knowledge of conditions in Nebraska, in your opinion what will be the effect of the continuation of the special assessments upon the banks in Nebraska?"
>
> A. "I am of the opinion that the assessments will ultimately, if continued any considerable length of time, force a majority of the banks into liquidation."

Mr. Schantz, president of the State Bank of Omaha, testified (Rec. p. 592, Q. 3735):

> 3735 Q. "What in your opinion will be the effect of the continuance of the special assessment upon a large number, a majority of the banks as to impairment of the capital of the present going state banks in Nebraska?"
>
> A. "I think 400 banks will be operating with impaired capital."

Governor Weaver, in his inaugural address to the Legislature, while this suit was pending, in January, 1929, and who constitutes the official head of the state banking department and is a defendant in this case, and whose duty it is to advise the Legislature on those subjects and problems confronting the state, made the following solemn pronouncement (Rec., Exhibt 11, pp. 215-216):

> "When the facts relating to the public business present a grave problem requiring solution, such facts should be stated fully and frankly. I therefore respectfully call your attention to the fact that the Guarantee Fund, as nearly as I can ascertain, has present and prospective liabilities above present

assets of from sixteen to twenty million dollars; that the present income from assessments on banks is approximately one and one-half million dollars; that most of these liabilities either are, or soon will be, reduced to judgment, and the judgments will draw interest at seven per cent, which on a basis of twenty million dollars makes an annual interest charge of one million-four-hundred-thousand dollars; that with any appreciable reduction in this income either from further bank failures, nationalization of some of the present state banks, or seasonable declines in deposits, the income will meet the interest charge only, and no funds will be available to pay the principal; that under such a situation the Guarantee Fund cannot afford protection for present depositors against any future losses. * * *

"It logically follows, therefore, that we should draw a clear line of division between our program for liquidating past obligations and our program for the future. Justice to the splendid state banking institutions which have helped build Nebraska, and which must continue as indispensable factors in the state's growth and progress, demands that they must not be called upon for all the funds sufficient to simultaneously liquidate past obligations and build a fund for present and future needs. This position is sustained by the fact that the state banks of Nebraska have already paid, in their efforts for the protection of their depositors, an amount almost equal to the capital of all state banks, and that a continuation of such a load threatens the whole *system*.

General Conclusions of Fact.

The state is now asking to further draw upon the assets of the going banks and use the money to pay depositors in failed banks; to take from the protection of one class of depositors, the depositors in going banks,

in order to pay the other class of depositors those depositors in banks that have failed and who all these years have had the benefit of assessments against the going banks. This process takes from one class and pays to another; it benefits one and injures the other.

There is no dispute as to the theoretical basis of the law nor as to what was its original purpose. The theory was that the state banks by paying an assessment would contribute to a fund which should be kept at the amount of 1½ per cent of the total average deposits of all banks in the state and which would stand always immediately replenished when drawn upon and serve as a mutual protection for each and all of the going banks and their depositors in the state. Should a bank fail depositors would be paid, the assets of the banks used to restore and replenish the Guaranty Fund and the losses minimized or entirely recouped, the balance of the fund brought up by continuing assessments, would still afford protection to current depositors. A bank might fail by being unable to immediately pay its depositors, but if given a period of time in which to liquidate and realize upon its assets, would be eventually able to satisfy those claims. The Guaranty Fund thus created and thus operating would instill in the minds of the people confidence in the strength of the state banking system and this confidence would lead to stability in banking. Current depositors would know that they were protected by the assessment, limited as to each individual bank but secured by these aggregate total assessments which would produce a large fund for that purpose. The banks for 17 years under the operation of the law made the contributions required of them by the statute and until within the last year prior to the commencement of the suit the condition of the Bank Guaranty Fund, as disclosed

by the state banking department, which is the only source from which such information could have been obtained, has been thought to be solvent and to have been a satisfactorily operating law.

That condition has gone. Not only is there no security to the depositors in banks today from the Guaranty Fund, but the payments made to the Guaranty Fund by the present banks detract from such security and without any hope of these payments becoming a benefit to the present depositors in the face of an admitted deficit in the Guaranty Fund of over $16,000,000.00, which day by day is increasing in amount and with assessments against the banks, even in the huge amounts now exacted, insufficient to more than pay the interest at 7 per cent upon the already accumulated claims.

SUMMARY OF THE EVIDENCE UPON WHICH IT IS CLAIMED BY THE DEFENDANTS THAT THE BANKS HAVE WAIVED OR ARE ESTOPPED TO RAISE CONSTITUTIONAL QUESTIONS.

Publicity Given by the Banks to the Fact That Their Deposits Were Protected by the Guaranty Fund.

The record shows that many of the banks displayed signs that their deposits were protected by the Guaranty Fund of the State of Nebraska, and many of them carried that recital, or a small stamp containing the recital, on their drafts and checks.

But this was in response to the directory provisions of the statute. The Bank Guaranty Law, by Section 7995, Statutes of Nebraska for 1922, provides:

> The department of trade and commerce "shall issue to said banking corporation a certificate stating

> that said banking corporation has complied with the laws of this state for the protection of bank depositors, and that its depositors are protected by the depositors' guarantee fund of the State of Nebraska. Every banking corporation receiving such certificate shall conspicuously display the same in its place of business and said banking corporation may print or engrave upon its stationery words to the effect that its depositors are protected by the depositors' guarantee fund of the State of Nebraska."

This provision of the statute made it one of the requirements of the law that the state bank give notice that its depositors were protected by the "guarantee fund of the State of Nebraska." The banks were required to conspicuously display the certificate which contained such statement, and the directory provision of the statute also suggested that they print or engrave upon their stationery words to the effect that "its depositors are protected by the depositors' guarantee fund of the State of Nebraska."

What the banks did in this respect was simply in pursuance of and carrying out the provisions of the law.

Newspaper Advertisements with Respect to the Guaranty Law, Made During 1926.

The advertisements in the Omaha Bee were published in June, July, August and September of 1926.

The full page advertisements in the Omaha Bee were initiated by that newspaper itself, through Mr. Wilson, the editor. His purpose, of course, was to procure advertising for his newspaper. He first went to the Department of Trade and Commerce and to the Guaranty Fund Commission of the State of Nebraska and suggested to them his idea of advertising the Guaranty Fund. Those departments furnished him the facts and

the material to go into the advertisements, and after these were prepared and approved by the state departments they were then submitted to the banks, with the approval of these state departments, for publication. It is true that 300 of the banks paid for these publications, but it was an advertisement put up to them and sponsored by the state departments, properly reflecting the facts as they were known at that time. The purpose of these advertisements at that time was to prevent a run on the Nebraska banks, as had been occurring just across the border in the Dakotas.

Mr. Wilson testified as follows (Rec. pp. 220-221, Qs. 1096-1104 and Q. 1109):

1096 Q. "Who prepared the copy, Mr. Wilson?"
A. "Mr. Ballard Dunn and myself."

1097 Q. "Who was Ballard Dunn?"
A. "He was then editor-in-chief of the Omaha Bee."

1098 Q. "To whom was it submitted before publication?"
A. "It was submitted to Mr. Van E. Peterson, secretary of the Guaranty Fund Commission and members of the commission at that time."

1099 Q. "Was it submitted also to Mr. Griggs?"
A. "Also Kirk Griggs, secretary of the Department of Trade and Commerce."

1100 Q. "Before it was published?"
A. "Yes, sir. But members of the Guaranty Fund Commission didn't always see all advertisements, but they were always submitted to Mr. Peterson."

1101 Q. "Before publication?"
A. "Yes, sir."

1102 Q. "Was that submitted to them before the banks were solicited to pay for it?"

A. "The idea was submitted to them."

1103 Q. "The idea was submitted to the Department of Trade and Commerce before?"
A. "Yes, sir."

1104 Q. "And the banks were told it received their approval?"
A. "Yes, sir."

1109 Q. "Who furnished you the information from which you prepared the advertisements?"
A. "The members of the Guaranty Fund Commission and Kirk Griggs."

In addition to the testimony hereinbefore quoted, Mr. Schantz, Mr. Stephens and Kirk Griggs all testified that the advertisements published in the Bee were sponsored by and the facts set out therein furnished by the Department of Trade and Commerce, through their two officers, Mr. Griggs and Mr. Peterson.

Some of these advertisements being published in the Omaha Bee were also by a single banker, Mr. Stephens, of Fremont, published in a local newspaper there. His advertising could not be material to the issues here, for, so far as this case is concerned, it was a private and individual action on the part of one banker, for which the bankers of the state could in no way be accountable.

At the time of these publications, the state departments having exclusive right to all of the information with regard to the Guaranty Fund, were not aware and did not know the true situation, and the banks, which did not have the information even that these state departments had, were much more in the dark and believed at that time that the Guaranty Fund was operative and solvent.

The trial court made such a finding. Referring to the banks the court said (Rec. p. 52):

> "They contend that when they were stressing the advantages of that law they did not know the actual conditions of the state banks. That undoubtedly was true."

Information Given Out by the State Departments in the Year After That in Which the Newspaper Advertising was Done.

If the banks are to be estopped, or if it is claimed that they have waived any rights, it must be upon the basis that the banks had knowledge of conditions. There can be no estoppel or waiver unless it is done with knowledge, and there can be no estoppel unless the other party had no knowledge The Department of Trade and Commerce, being the agency of the public and thereby being the agency of the depositors as well, refused at all times to permit the banks or their representatives to see or have access to the records that would show the actual conditions of the banks and of the Guaranty Fund. All the bankers were able to do was to read such compilations as were from time to time furnished by the Department.

Prior to 1927 no information was given publicity by the state departments reflecting in any way against the Bank Guaranty Law or the Depositors' Guaranty Fund.

The Department of Trade and Commerce and the Guaranty Fund Commission, up to within a short time prior to the bringing of the suit, constantly informed the bankers and the public that the Guaranty Fund, with current assessments together with the assets of failed banks, was entirely solvent.

Such a declaration was made by the Guaranty Fund Commission, as shown by Exhibit 5 (Rec. pp. 127-129, incl.), in January, 1927. The pamphlet was at that time "sent out to the public and given to people who inquired for it" (Rec. p. 111, Q. 262), and indicated that the total deficit was only $2,715,000.00, which was fully covered by stockholders' liability of $3,588,000.00, as well as being protected by the yearly current assessment of practically $1,500,000.00 against the banks. It lauded the condition of the banking system and of the Guaranty Fund system. It declared that (Rec. pp. 129-130):

> "While this report covers the work up to July 1, 1926, the condition as of January 1, 1927, is but very little different. During the last six months of 1926 we took over eighteen banks but the loss in these banks is not as much as the loss paid during the same period. On January 1st we were operating forty-four banks as against thirty-six on June 30th, but the deposits of these forty-four were one hundred thousand dollars less. The average loss per bank closed is continually growing less and we do not feel that there will be a very large number of banks yet to be closed in which there will be a loss to the Guaranty Fund."

The report concluded with the remark: "Truly, Nebraska is a remarkable state and tells a story no other state can tell."

In May, 1927, Mr. Bliss estimated an approximate loss of $1,118,000.00 (Rec. p. 206, Q. 1021) from 64 banks that would in the future, in his estimation, be taken over. The trial court in the memorandum opinion refers to Mr. Bliss' prophesy as follows (Rec. p. 52):

> "As late as May 17, 1927, * * * the secretary of the Department of Trade and Commerce reported that

a study of the going banks showed that the future net loss would approximate $1,118,000."

As a matter of fact, there were 100 banks soon taken over instead of the 64 predicted by Mr. Bliss, and instead of there being a seven million dollar deficit in the Bank Guaranty Fund, as predicted in May, 1927, it develops that the deficit was over $16,000,000.00, and that the amount was rapidly increasing. Mr. Bliss did at that time also state that there were in all some 300 or 350 banks whose capital was impaired, but as to many of these, he declared that this was only slight and easy to remedy (Rec. p. 161, Q. 598).

On August 11, 1927, the secretary of the Guaranty Fund Commission in a report made this statement (Rec. pp. 125-126):

"In closing my report to you (the report made January 22, 1927), covering the work up to June 30, 1926, I said: 'Truly, Nebraska is a remarkable state and tells a story no other state can tell.' At the close of this fiscal year, we can both truthfully and proudly re-affirm that statement. The past year with its payment of more than $7,500,000.00 in cash to claimants adds another chapter to the story. Nebraska is proud of her record made by the Depositors' Guaranty Law, and with the favorable crop conditions which nature has bestowed upon us, the future appears much brighter. We know the larger portion of our troubles is past. Whatever degree of success has been obtained by the Commission is due to the loyalty and cooperation of the state bankers, the members of the Commission, and all those who are employed in the work, and to all I want to express my appreciation of their services and loyalty."

Claims of the Depositors Against the Guaranty Fund Were Paid up to November 30, 1927.

Mr. Van E. Peterson, secretary of the Guaranty Fund Commission, testified as follows (Rec. pp. 563-564, Qs. 3637-3639):

3637 Q. "What is the date farthest removed of liabilities, unpaid liabilities to depositors in the Guaranty Fund Commission?"

A. "November 30, 1927."

3638 Q. "You say all paid up to date, until that time?"

A. "Yes, we are now."

3639 Q. "You referred to what sort of claims when you gave the date of November 30, 1927?"

A. "Claims adjudicated by the Court and ordered paid from the Depositors' Guaranty Fund."

The First Public Intimation that the Guaranty Fund Might Fail was Given in June, 1928.

Mr. Bliss, secretary of the Department of Trade and Commerce, testified as follows (Rec. p. 471, Qs. 2871-2873):

2871 Q. "And in September, 1928, was that the first time you knew of the condition of the Fund being published?"

A. "No, I think there was something published as far back as June."

2872 Q. "1928?"

A. "Yes."

2873 Q. "That is as far back as you know of the condition being made public?"

A. "As far as I recall."

The Defendants Will Urge that the Banks, Having Received Benefits Under the Law, Should not be Heard to Complain. Operation Under the Law, However, was Compulsory, and Whether the Law Has Been Beneficial or Injurious is a Mooted Question.

Probably no better epitome of the fallacy of the Guaranty Fund Law can be found than what was set forth in the report of the Comptroller of the United States Currency as far back as 1921, in which he quotes from a well-known financial writer as follows:

> "The theory (guaranty of bank deposits) is that of insurance, but it has certain fundamental weaknesses which are more serious in their effect upon banking than in their relation to most other kinds of business to which insurance is applied. Insurance is sound as a protection against unavoidable hazards, but dangerous whenever it tends to increase the hazards. The insurance or guaranty of bank deposits tends to increase the hazards by eliminating the value of character as a banker's asset. It tends to make all banks look alike to the public, and puts the careful, conservative banker, who is unwilling to make large promises and take large chances, at a disadvantage. The theory is at fault in placing more emphasis upon the payment of depositors after a bank has failed than upon preventing failure. Its weakness always develops in a crisis."

In every state where the law has been enacted, it has hopelessly failed. The Guaranty Fund Commission of the State of North Dakota has recommended the repeal of that law. It is pointed out there that in order to pay the depositors' claims in that state of $14,498,663.75, *without interest*, it would take 122 years.

In every state the law has proved a failure. New York passed the first law in 1829; it failed. Vermont followed;

it failed. Texas, in 1909, enacted such a law; it failed in 1927, leaving $16,000,000.00 in claims unpaid. Kansas, in 1909, enacted a law, leaving it optional to the banks to come in or to withdraw. All banks have now withdrawn and the law is inoperative. In the state of Washington, 1917, a law was enacted and in 1921 amended to permit the banks to withdraw, and by reason of withdrawal of banks the law became inoperative the following year. In Mississippi a law was enacted in 1914, and the fund there has become hopelessly insolvent. In South Dakota the guaranty fund law was enacted in 1915, and has incurred net losses of $20,000,000.00 in 11 years. The Oklahoma law of 1910 failed.

Counsel for the state made much of the expressed opinion of Mr. Woods that the Bank Guaranty Law would account for $100,000,000.00 deposits in the state banks, which deposits would have gone to national banks or to other investments except for the Bank Guaranty Law. This necessarily, on the part of Mr. Woods, was a pure speculative guess, and this he admitted (Rec. p. 253, Q. 1293). This opinion of Mr. Woods, we take it, was based upon a false assumption.

The record shows that in 1911, 669 state banks had $73,000,000.00 in deposits (Rec. Exhibit 10, p. 422). In 1928, 726 state banks had $252,000,000.00 deposits. In 1911, 219 national banks had $83,000,000.00 deposits (Rec. p. 397, Qs. 2356-9), and in 1928, 159 national banks had $215,000,000.00 deposits (Rec. p. 593, Q. 3739). Without analysis it appears that the deposits in state banks increased over national banks to the extent of almost $50,000,000.00. This is because one may fail to consider that the number of state banks has, since 1911, largely

increased while the number of national banks since that time shows just the reverse, a substantial decrease.

When considered, let us see what these figures show. In 1911 the amount of deposits in state banks, divided among banks, shows deposits for each bank of $109,000.00. When divided among the existing state banks in 1928 there was in each bank an average of $346,000.00. In other words, the deposits had increased *three-fold* in state banks. But in 1911 the deposits in the national banks was on the average of $379,000.00 for each bank and the deposits in national banks in 1928, as to each bank was on the average of $1,356,000.00. In other words, the deposits in national banks had increased practically *four times*. The fact that there are larger aggregate deposits in state banks is easily accounted for. First, there are nearly five times as many state bank as national banks; second, a very great many of the communities in the state have no national banks, but are served by state banks alone.

Both Mr. Bliss and Mr. Woods declared in their testimony that the Guaranty Fund had little influence in attracting deposits in all cities of the size of Fremont, Grand Island, Hastings and above. (See Mr. Woods' testimony, Rec. p. 282, Q. 1472; Mr. Bliss' testimony, Rec. p. 409, Q. 2448).

The largest state banks, then, the banks in the cities, those making the largest contributions to the Guaranty Fund, received the smallest, if any, benefits even during the operative period of the law. The assessment against the State Bank of Omaha has been around $40,000.00 per year; of the Fremont State Bank around $11,000.00 per year; and of the Continental State Bank of Lincoln around $8,000.00 per year.

In Omaha it was pointed out that the deposits in all state banks was $12,000,000.00, while in national banks it was $102,000,000.00.

Mr. Woods was unable to name, except for one or two instances, where the national banks in any town had deposits less than the state banks.

Although Mr. Woods, testifying for the defendants, made a guess that the Guaranty Fund had attracted to state banks $100,000,000.00, still the record shows that he was an executive officer of a state bank, The Lincoln State Bank, in 1923, and that to avoid the payment of the special assessments and to avoid the obligation of operating under the Guaranty Law, *his bank nationalized*. That bank is now the Lincoln State National Bank.

With reference to the fact that his bank had nationalized, he said that it was desired to pursue a conservative policy and this they could not do, if they were to attempt to pay the large assessment (Rec. p. 251, Q. 1282):

> "We decided we would rather nationalize where we would be free to carry out that policy than to continue as a state bank and operate less conservatively in order to pay that *big assessment*."

Most of the state banks in Nebraska could not qualify for a national charter.

ASSIGNMENTS OF ERROR.

I.

The decision of the Supreme Court of Nebraska is erroneous in holding that the provisions of the Bank Guaranty Law complained of were constitutional and not in violation of the Fourteenth Amendment of the

Constitution of the United States and did not constitute the taking of property of the plaintiffs without due process of law, when in fact the assessments were unreasonable, oppressive and confiscatory.

II.

The decision of the Supreme Court of Nebraska is erroneous in holding that the provisions of the Bank Guaranty Law complained of were constitutional and not in violation of the Fourteenth Amendment of the Constitution of the United States and did not constitute the taking of property of the plaintiffs without due process of law, when the assessments in fact constitute a taking of private property for private use without just compensation; and when the enforcement of assessments bears no real or rational relation to any public good.

III.

If the decision of the Supreme Court of Nebraska is found to be based in part upon the ground that the banks were estopped or had waived their rights, then such portion of that decision, upon the undisputed facts in the record, is palpably unfounded both in fact and law.

BRIEF AND ARGUMENT

GENERAL DISCUSSION OF VALIDITY OF THE LAW AS A POLICE REGULATION, CONSIDERED IN THE LIGHT OF THE EFFECT OF ITS OPERATION UNDER PRESENT CONDITIONS.

The law expressly states its own purpose. Section 8024, Comp. Stat. Neb. 1922, declares that the law is "for the purpose of providing a Guaranty Fund for the protection of depositors in banks." The assessments com-

plained of are not to be collected for that purpose now. No fund exists and none can be created from these assessments with a present deficit of from $15,000,000.00 to $20,000,000.00. The present assessments in no way tend to contribute to the protection of the depositors in going banks. If a present existing and contributing bank should fail, its current contributions would not go to the payment of its own depositors but to the payment of depositors in other banks, which have long since failed.

The depositors in failed banks, having had the full benefit of all assessments levied under the law while they were depositors, and up to the time of the commencement of this suit, now seek to reach into the future and take from the present banks moneys placed there by their own and future depositors, and when the withdrawal of such moneys takes from the security of the very depositors who have placed the money there.

The operation of the law can serve no public interest now; it does not strengthen the present banking system nor protect current depositors. On the contrary it takes the amount of the assessments, totaling a million and a half a year, away from going banks and when the banks are in such condition, with reference to their own obligations and with reference to their own earnings that the assessments are oppressive, exorbitant and confiscatory and do not permit them compensatory returns upon their investment.

Instead of the regular assessments of 1/20 of one per cent being sufficient to create the fund and, after the fund was created, these assessments cease except in case of the necessity of re-continuing them when the fund should be depleted, we find not only that these regular assessments have themselves become continuous but that

the special assessments of ½ of 1% have also become regular.

In the beginning of the law the special assessments, which were a reserve provision to take care of the fund in case of emergency, and which were intended to be intermittant and special, and rarely, if ever, resorted to, have now become a part of a regular burden, if the operation under the law is to be continued. They are imposed when the fund is depleted, and the fund is not only gone but its depletion will never be cured, and the regular and special assessments must both, from now on, if the law continues to operate, be continued indefinitely and forever; a burden never contemplated when the law was enacted.

The payment of these assessments, used to pay the depositors in failed banks, prevents the going banks from meeting their own losses and their own obligations. The assessments confessedly are a complete loss to these banks and weaken them and destroy the security for present depositors. There are no reciprocal benefits received by these banks in return for these assessments. The welfare of the banks in which the public is interested is not served. It is damaged.

The conditions which supported the law in its beginning as a proper exercise of the police power, based upon the debatable ground as to how it would operate, have disappeared; speculation and prophesy have been supplanted by fact. The conditions have so changed and reversed themselves during the lapse of twenty years, while the law has been in operation, that the law can no longer now be justified. It now bears no real or substantial relation to the effectuation of its original object and purpose. Actually it defeats that object.

As we view it, the matter is not now open to argument but that the present assessments are unreasonable, exorbitant, oppressive, confiscatory and above all that the law authorizing the collection of these assessments bears no real or substantial relation to effectuating the original object of the law or any public good.

IN NOBLE STATE BANK V. HASKELL THE QUESTION OF WHETHER THE TAX WOULD BE OPPRESSIVE OR CONFISCATORY WAS EXPRESSLY ELIMINATED BY THE STATE COURT.

The Oklahoma Supreme Court, in *Noble State Bank* v. *Haskell*, 97 Pac. 590, 22 Okla. 48, pointed out that there was nothing in the record upon which the question of whether the tax was unreasonable in amount or confiscatory could be raised. At that time the amount of the assessment for the future had to be *estimated*, and there was nothing to show that the banks could not pay the estimated future assessment and also earn reasonable dividends.

The court said:

> "Counsel for plaintiff in error neither makes any contention or any attempt to show that the annual profits of this bank will not exceed any reasonable estimated assessment to be made by the banking board for said depositors' guaranty fund, nor that such assessment or assessments will prevent the bank from earning a reasonable annual dividend, * * *
>
> "Where can this be any confiscation of any rights acquired under any bank charter; there being no contention made that the reasonable estimated assessments will be so large as to prevent the bank annually from earning a sufficient amount to pay this assessment, and also a reasonable dividend?"

SCOPE OF THE OPINION OF THE SUPREME COURT OF THE UNITED STATES IN NOBLE STATE BANK V. HASKELL.

(a) The Law Was Justified as a Reasonable Exercise of the Police Power Upon the Conditions then Presented.

The above case was a suit originally brought in Oklahoma to enjoin the enforcement of the bank guaranty law of that state before it had been put in operation.

A similar suit was brought at the same time in Nebraska, by the state banks, to enjoin the putting into effect of the Bank Guaranty Law of the state of Nebraska. *Shallenberger* v. *First State Bank of Holstein*, 219 U. S. 114, 55 L. ed. 117. The Nebraska case was controlled by *Noble State Bank* v. *Haskell*, 219 U. S. 104, 55 L. ed 112. It is the Nebraska case that appellees contend is res adjudicata here.

These cases were determined by the Supreme Court of the United States prior to operation under the law. Nothing was before the court except what the assumed operation of the law would be. It was at that time estimated, as the opinion discloses, that when the Guaranty Fund was once created, it would stand permanently and without substantial additional assessments to maintain it. What the amount of future assessments would be could not be foretold. The question of whether they would become in the future oppressive and confiscatory was not, and could not be, at that time before the court for decison.

The Guaranty Law was sustained as a proper exercise of the police power of the state. Every presumption at that time was in favor of the constitutionality of the

law. There were no facts yet developed to refute such presumptions.

The facts upon which that decision was premised was the purpose of the law and its estimated operation.

The court, in *Noble State Bank* v. *Haskell*, pointed out that a depositors' guaranty fund would be created and, once created, it was proper to assume would need little to maintain it. The court said:

> "When a bank becomes insolvent and goes into the hands of the bank commissioner, if its *cash* immediately available is not enough to pay depositors in full, the banking board is to draw from the depositors' guaranty fund (and from additional assessments if required) the amount needed to make up the deficiency. A lien is reserved upon the assets of the failing bank to make good the sum thus taken from the fund. * * *
>
> "And while we should assume that the plaintiff would retain a reversionary interest in its contribution to the fund, so as to be entitled to a return of what remained of it if the purpose were given up (see *Danby Bank* v. *State Treasurer*, 39 Vt. 92, 98), still there is no denying that by this law a portion of its property might be taken without return to pay debts of a failing rival in business."

The case of *Danby Bank* v. *State Treasurer*, 39 Vt. 92, cited, was a holding by the Supreme Court of Vermont that the depositors' guaranty fund, so created, remained the property of the banks and that where the bank's charter terminated it would be entitled to withdraw its pro rata portion of that fund.

This condition of the existence and maintenance of a Guaranty Fund proposed to be provided by the law has now disappeared. There is no fund, but instead a lia-

bility against future assessments, if collectable, of from $15,000,000.00 to $20,000,000.00.

It was, at the time of the decision in *Noble State Bank* v. *Haskell*, contemplated that future assessments, after the fund was created, would be small. The court said:

> "It is established by a series of cases that an ulterior public advantage may justify a *comparatively insignificant* taking of private property for what, in its immediate purpose, is a private use."

The fact of small assessments after the creation of the fund has also disappeared. Instead of the *possibility*, as the court pointed out, that a portion of a bank's property "*might* be taken without return to pay debts of a failing rival," where the assets of such failing bank were insufficient to fully replenish the fund, we now, through alteration of conditions during 20 years experience, find that what was contemplated to be a special assessment, rarely to be levied and only upon that infrequent occasion when a failing bank's assets should be insufficient in the end to replenish the fund, has become regular and now amounts to a total of 8 per cent per annum upon the capital of the banks. The court in the opinion said that a comparatively insignificant taking for an immediate private use, when grounded on an ulterior public advantage, would be justified, but this would not permit such exactions on a large scale. The court said:

> "It will serve as a *datum* on this side, that, in our opinion, the statute before us is well within the state's constitutional power, while the use of the public credit on a large scale to help individuals in business has been held to be beyond the line."

Assuming the necessary existence of the fund, since it was provided for by the law, at the time of the de-

cision in *Noble State Bank* v. *Haskell*, its purpose and effect was also considered as measuring the justification of the law. The fund was intended to protect depositors in going banks. It was therefore of benefit to the banks. Each bank received a reciprocal benefit. The court said:

> "The share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume."

The existence of the fund protected depositors in *going* banks. The fund is now gone. The exact reverse situation now prevails. Assessments do not create a fund nor are they for the protection of depositors in *going* banks but take away from the protection of such depositors.

The court pointed out the effect and purpose of the maintenance of the Guaranty Fund and the conditions which would result in public benefit, saying:

> "One of those conditions at the present time is the possibility of payment by checks drawn against bank deposits, to such an extent do checks replace currency in daily business. * * * Even the primary object of the required assessment is not a private benefit, * * * but it is to make the currency of checks secure, and by the same stroke to make safe the almost compulsory resort of depositors to banks as the only available means for keeping money on hand. * * * The power to compel, beforehand, cooperation, and thus, it is believed, to make a failure unlikely and a general panic almost impossible, must be recognized * * *."

Under the conditions then assumed to exist, which conditions were presented to the court by the provisions of the law, and the presumptions then in its favor, the contribution to and maintenance of the fund was found to be within a reasonable exercise of the police power and

bore a direct relation to the public good. The banks received a reciprocal benefit from the operation of the law. The depositors received protection from the fund itself. It would make the currency of checks secure and bank failures unlikely.

These conditions have changed. The present banks receive no reciprocal benefits through assessments. Their assessments are utterly lost. The depositors in going banks receive no protection through these assessments. Their protection is destroyed. These contributions do not tend to make bank failures unlikely, but, by weakening the banks cause a tendency to failure. An obligation to pay the large liability of from $15,000,000.00 to $20,000,000.00 would discourage the making of deposits in state banks. The operation of the law now indisputably defeats its own object. While the public welfare was served through the protection of depositors, when that protection ceased, public benefits disappeared. The law cannot now be said to operate for a public purpose nor in its operation serve any ulterior nor direct public advantage. That characteristic of the law, which then justified it, is now gone.

In that opinion the court said the regulation could be justified:

> "Unless we can see that the means have no reasonable relation to the end."

The condition now presents such a situation. The operation of the law has no reasonable relation to the end sought to be attained.

(b) The Opinion Does Not Warrant the Interpretation That the State Could Impose Whatever Conditions Upon Banking it Saw fit to Exact, Even Though Arbitrary or Unreasonable.

It will be the contention of the appellees that the opinion of the court in *Noble State Bank* v. *Haskell* warrants the interpretation that the state had absolute power over banking corporations, since they were creatures of the state, and could impose upon banks, as conditions to their continuing to do business, whatever exactions the legislature might prescribe, whether reasonable or unreasonable, arbitrary or capricious, and that the banking business could not be conducted unless those conditions were met.

The court held that banking was of such a nature that the state might be able to take the whole business of banking under its control, and said:

> "We are of opinion that it (the state) may go on from regulation to prohibition except upon *such conditions* as it *may* prescribe."

Such conditions, however, referred to by the court, must have been, in light of the opinion, such *reasonable* conditions as would have been justified under the police power, and *not arbitrary, unreasonable or oppressive* conditions, nor *unconstitutional deprivations.*

The conditions referred to are immediately mentioned by the court, for, in explanation of this statement, the court continues as follows:

> "In short, when the Oklahoma legislature declares by implication that free banking is a public danger, and that incorporation, inspection, and the above-described cooperation are necessary safeguards, this court certainly cannot say that it is wrong."

The whole purport of this decision is that the law in its theory of operation bore a rational relation to a public purpose properly within the scope of the police power.

Considered in its context, the statement of the court could have meant nothing other than that the state could impose such reasonable conditions as were justified under the police power; that it could impose such conditions as the state "*may*" or, in other words, "*has authority*" to prescribe.

The court did not hold that the state would have the power to prohibit the banking business arbitrarily and absolutely without taking over unto itself that business.

We give significance to the statement of the court that the charter rights of the banks would not be impaired:

> "*unless that statute deprives the plaintiff of life, liberty or property without due process of law.*"

In other words, the conditions sought to be imposed upon the banks must not violate constitutional protection.

Again, speaking of the conditions imposed upon the banks as being justified and within the exercise of the police power, in the opinion on rehearing the court further said:

> "We have given what we deemed sufficient reasons for holding that such a condition may be imposed."

The whole purport of the Supreme Court's decision, as we view it, was based upon the question of whether or not the act was then a reasonable exercise of the police power, and the decision has been so interpreted by the

Supreme Court of the United States and other courts since.

IN SUBSEQUENT DECISIONS BY THE SUPREME COURT AND BY OTHER COURTS THE CASE OF NOBLE STATE BANK V. HASKELL IS CITED AS A RULING INVOLVING ALONE THE POLICE POWER OF THE STATE.

We have examined the subsequent cases where *Noble State Bank* v. *Haskell* and the companion Guaranty Fund decisions are cited. In every instance the Guaranty Fund decision is cited as a holding involving the question of the exercise of the police power.

The case of *Farmers and Merchants' Bank* v. *Federal Reserve Bank*, 262 U. S. 649, 67 L. ed. 1157, involves banking legislation of the state of North Carolina. The Supreme Court of the United States, referring to the Guaranty Fund decision, said:

> "So construed, the statute is merely an exercise of the police power, by which the banking business is regulated for the purpose of protecting the public, and promoting the general welfare. *Noble State Bank* v. *Haskell*, 219 U. S. 104, 575, 55 L. ed. 112, 341, 32 L. R. A. (N. S.) 1062, 1065, 31 Sup. Ct. Rep. 186, 299, Ann. Cas. 1912A 487."

In the case immediately following the Guaranty Fund cases, *Engel* v. *O'Malley*, 219 U. S. 128, 55 L. ed. 128, the court held that the state had, as a reasonable exercise of the police power, the right to require licenses from individuals who should engage in the banking business. In that case Mr. Justice Holmes, in referring to the decision in *Noble State Bank* v. *Haskell*, says:

> "The case cited (*Noble State Bank* v. *Haskell*) establishes that the state *may regulate that business*, and may take strong measures to render it secure.

> It also establishes that the plaintiff has no such constitutional right to carry it on at will as to *raise him above state laws not manifestly unfit to accomplish the supposed end, greatly in excess of the need, or arbitrary and capricious in discrimination.*"

The limitation upon the state's power in the exercise of a police regulation is reiterated by Mr. Justice Holmes in the case of *Pennsylvania Coal Company* v. *Mahon*, 260 U. S. 393, 67 L. ed. 322. In that case the court declared:

> "What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it."

And referring incidentally to a statutory provision requiring coal mining companies to observe certain cooperative measures for the reciprocal protection of each other, the court, following the reasoning in *Noble State Bank* v. *Haskell*, through Mr. Justice Holmes, said:

> "That was a requirement for the safety of employees invited into the mine, and *secured an average reciprocity of advantage that has been recognized* as a justification of various laws. * * *
>
> "The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. * * * In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders."

State courts have also so interpreted the decision. In *Eureka County Bank Habeas Corpus Cases*, 126 Pac. 655, 35 Nev. 80, the court in the opinion said:

> "In *Noble State Bank* v. *Haskell*, 219 U. S. 111, 31 Sup. Ct. 186, 55 L. ed. 112, 32 L. R. A. (N. S.)

1062, Ann. Cas. 1912A 487, it was held that the levying and collection from banks existing under state laws of an assessment based upon daily average deposits, for the purpose of creating a depositors' guaranty fund for the purpose of securing the full payment of deposits in case any such bank becomes insolvent, is a valid exercise of the police power. In that case the Supreme Court of the United States, considering provisions of the federal Constitution which, it was claimed, restricted the power of the state or the legislature, Mr. Justice Holmes writing the decision, said: 'We are of the opinion that it may go on from regulation to prohibition, except upon such conditions as it may prescribe.'

"Whether the legislature may entirely prohibit the banking business was not a question before the court in that case, and to this extent the language may be considered obiter. The court said that objections under the state Constitution were not open there. Whether that eminent tribunal, or any court, would hold that the Legislature may entirely prohibit the banking business, because it is of such public concern that it is subject to regulation it is not necessary to consider, any more than it would be to determine whether the Legislature may prohibit the sale of groceries and drugs, because laws are properly enacted requiring the purity of these articles, or to prohibit the transportation and manufacturing businesses, because laws are properly enacted regulating and safeguarding these under the police power."

And in some cases it has been held, in the absence of a consideration of the event that the government take over the business of banking, that the business of banking cannot be prohibited, although it is subject to regulation under the police power.

Weed v. *Bergh*, 141 Wis. 569, 124 N. W. 664, 25 L. R. A. (N. S.) 1217.

Re Pittman, 31 Nev. 43, 99 Pac. 700.

RESERVE POWER OVER CORPORATIONS IS NOT UNLIMITED AND THE REGULATION, AS AN EXERCISE OF THAT POWER, WOULD BE VALID ONLY SO LONG AS THE REGULATION WAS REASONABLE AND DOES NOT IMPAIR THE OBJECT OF THE GRANT.

The question of the right to repeal the charters of the banks is not involved in the case, for there has been no legislative attempt to do that.

A banking charter is a special privilege granted to such of those corporations applying as are selected by the banking board. Banking rights are denied to individuals. The banks are by statute declared to be quasi-public institutions. Their charters, when acted upon by them, we contend constitute franchises granted by the state in consideration of the performance of a public service, and constitute property rights within the protection of the Fourteenth Amendment.

Frost v. *Corporation Commission*, 278 U. S. 515, 519, 534, 73 L. ed. 483, 487, 494.

Bank of Augusta v. *Earle*, 38 U. S. (13 Pet.) 519, 595, 10 L. ed. 274.

But the Bank Guaranty Law is a regulation of existing banks, not a repeal of charters. Four hundred and ten of the banking corporations whose names appear on the petition were chartered prior to the enactment of the Bank Guaranty Law. The legislature has not prohibited them from continuing in business, but as a regulation of a business to be continued has added to their obligations that of the Bank Guaranty Law. It is a regulation governing going banks and, therefore, must not violate constitutional inhibitions.

These banks by statute have complex duties to perform. They have contractual rights with all of their depositors,

recognized and imposed by law, which they must carry out. The banks, as well as stockholders and directors, owe obligations, imposed by statute, to the creditors of the bank.

The Bank Guaranty Law, as applied to going banks, in its operation under present conditions, defeats the object of the banking charter, interferes with and impairs the ability of the bank to perform its obligations to its depositors and to its creditors, affects and increases the liability of its stockholders, takes from it by assessment property for a private purpose and without compensation.

The general reservation of powers over corporations, set forth in the Nebraska constitution (Constitution of 1875, which was in effect in 1909 when the Bank Guaranty Law was enacted, Article XIV, Section 1), is not as comprehensive in its scope as the provisions in Oklahoma, involved in the case of *Noble State Bank* v. *Haskell* (Oklahoma Constitution, Sec. 47, Art. 9; Wilson's Rev. & Ann. St. 1903, Sec. 3, Chap. 18).

But, however that may be, we understand the rule is that even a general reservation of the right to alter or amend gives the legislature the power to make any alteration or amendment in the charter which will not defeat or substantially impair the object of the grant or change its fundamental character.

Regulations imposed upon going corporations must be reasonable, justified under the police power, and not violate constitutional protection.

The reserve power of the state over corporations is not unlimited. The legislature can pass such laws affecting the corporation which bear in their operation a

real and substantial relation to the public welfare, and which do not defeat or substantially impair the object of the corporate grant. The extent of such reserve power to affect corporate rights in the interest of the public welfare is practically co-extensive with the limits of the exercise of the police power.

In the case of *Looker* v. *Maynard*, 179 U. S. 46, 45 L. ed. 79, the Supreme Court of the United States, referring to the reserve power of the state over corporations, declared that the power was not unlimited but could be exercised so long only as it did not defeat or substantially impair the object of the grant, and when the regulation was reasonable and done to protect the rights of the public and to promote the due administration of corporate affairs. In the opinion the court said:

> "Many a state of the Union, in order to secure to its legislature the exercise of a fuller parliamentary or legislative power over corporations than would otherwise exist, inserted, either in its statutes or in its Constitution, a provision that charters thenceforth granted should be subject to alteration, amendment or repeal at the pleasure of the legislature. * * * The effect of such a provision, whether contained in an original act of incorporation, or in a constitution or general law subject to which a charter is accepted, is, at the least, to reserve to the legislature the power to make any alteration or amendment of a charter subject to it, which will not defeat or substantially impair the object of the grant, or any right vested under the grant, and which the legislature may deem necessary to carry into effect the purpose of the grant, or to protect the rights of the public or of the corporation, its stockholders or creditors, or to promote the due administration of its affairs."

In *New York & N. E. R. Co.* v. *Town of Bristol*, 151 U. S. 556, 38 L. ed. 269, the court in the syllabus said:

> "A power reserved to the legislature to alter, amend or repeal a charter, authorizes it to make any alteration or amendment of a charter granted subject to it, which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the legislature may deem necessary to secure either that object or any public right."

In the case of *Stanislaus County* v. *San Joaquin & K's, R. C. & I. Co.*, 192 U. S. 201, 213, 48 L. ed. 406, 413, the court, in speaking of the power of the legislature to amend charters under the reserve power of the state, said:

> "These cases also hold that there is a limitation, even to the power of amendment, when reserved in the constitution or a statute of a state. Some of the cases, although holding that the power to amend or repeal was properly exercised in them, also state that the power is not without limit; that the alterations must be reasonably made, in good faith, and consistent with the scope and object of the act of incorporation, and that sheer oppression and wrong could not be inflicted under the guise of amendment or alteration; that beyond the sphere of the reserved powers the vested rights of property in corporations in such cases are surrounded by the same sanction and are as inviolable as in other cases."

We think the reasoning and holding in *Chicago, M. & St. P. R. Co.* v. *Wisconsin*, 238 U. S. 491, 59 L. ed. 1423, is particularly applicable. In that case the court held that a statute prohibiting the letting down of an unengaged upper berth in a Pullman car, when the lower berth was occupied, was unreasonable as a police regulation or as an exercise of the reserve power of the state over corporations.

It was contended that the statute was arbitrary and unreasonable, not designed to accomplish a legitimate public purpose, and contrary to natural justice. The court so held and found the regulation operated to take property from the railroad company in violation of the due process clause of the Fourteenth Amendment. The railroad was a going concern, it had complex public duties to perform, and, in view of its duties, it was held the regulation unduly and unreasonably interfered with the object of the public grant and could not be sustained. Speaking of the railroad company's duties to the public, the court said:

> "In this respect the statute would lessen the ability of the company to furnish the place of sleep and rest which it offers to the public. A sleeping car may not be an 'inn on wheels,' but the operating company does engage to furnish its patrons with a place in which they can rest without intrusion upon their privacy. Holding out these inducements and seeking this patronage, the company is entitled to the privilege of managing its business in its own way so long as it does not injuriously affect the health, comfort, safety and convenience of the public. The right of the state to regulate public carriers in the interest of the public is very great. But that great power does not warrant an unreasonable interference with the right of management, or the taking of the carrier's property without compensation."

As to the extent of the reserve power of the state over corporations, the court said:

> "In the brief of counsel for the state it is argued that the statute can be sustained as a valid exercise of the state's reserved power to alter the charter of the company. That question does not seem to have been raised in the state court, nor was its decision based on that proposition. Indeed, such a ruling would seem to have been opposed to *State ex rel.*

Northern P. R. Co. v. *Railroad Commission,* 140 Wis. 157, 121 N. W. 919, and the *Water Power Cases,* 148 Wis. 124, 38 L. R. A. (N. S.) 526, 134 N. W. 330, where it was held that the right to amend a charter does not authorize the taking of the company's property without just compensation. The same view has been repeatedly expressed in the decisions of this court. For example, in *Shields* v. *Ohio,* 95 U. S. 324, 24 L. ed. 359, it was said that 'the power of alteration and amendment is not without limit. The alterations must be reasonable * * * and be consistent with the scope and object of the act of incorporation.' * * * Again, in *Stearns* v. *Minnesota,* 179 U. S. 223, 259, 45 L. ed. 162, 180, 21 Sup. Ct. Rep. 73, it was held that the reserved right to amend a corporate charter 'does not confer mere arbitrary power, and cannot be so exercised as to violate fundamental principles of justice by * * * taking of property without due process of law.' *Lake Shore & M. S. R. Co.* v. *Smith,* 173 U. S. 690, 43 L. ed. 861, 19 Sup. Ct. Rep. 565; *Stanislaus County* v. *San Joaquin & K. River Canal & Irrig. Co.,* 192 U. S. 201, 48 L. Ed. 406, 24 Sup. Ct. Rep. 241; *Sinking Fund Cases,* 99 U. S. 720, 25 L. ed. 501; *Miller* v. *New York,* 15 Wall. 498, 21 L. ed. 104; see also *Delaware, L. & W. R. Co.* v. *Public Utilities,* 85 N. J. L. 28, 38, 88 Atl. 849, where it was held that, under such a power, the company could not be required to furnish free transportation to certain designated officials."

On this subject the cases are collected in Fletcher Cyc. Corporations, Vol. 7, Sec. 4317 and 4308.

Applying by analogy the reasoning in last above cited case to ours: The banks are quasi-public institutions: they have certain specific duties to perform and certain services to render to the public. The Bank Guaranty Law unduly and unreasonably interferes with those duties and impairs and destroys the object of the corporate

grant. As to these going corporations the enactment of the Guaranty Law has now become, under present operation, a violation of the due process clause of the Fourteenth Amendment, whether the regulation is attempted to be justified under the police power or under the reserve power of the state over corporations.

IT IS NOT A SUFFICIENT ANSWER, WHICH APPELLEES WILL MAKE, TO SAY THAT THE CORPORATION MAY CEASE BUSINESS IN ORDER TO AVOID AN UNCONSTITUTIONAL BURDEN.

The banks are permitted to operate, and while so operating are entitled to constitutional protection.

The reasoning in the case of *Frost* v. *Railroad Commission*, 271 U. S. 583, 70 L. ed. 1101, is particularly pertinent to the issue here where the court held that a state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit so long as it does not require the relinquishment of constitutional rights. In that case, involving a statute of California, requiring private carriers on the highways to act as common carriers, the court, holding the statute unconstitutional, in the opinion said:

> "The naked question which we have to determine, therefore, is whether the state may bring about the same result by imposing the unconstitutional requirement as a condition precedent to the enjoyment of a privilege, which, without so deciding, we shall assume to be within the power of the state altogether to withhold if it sees fit to do so. * * *
>
> "There is involved in the inquiry not a single power, but two distinct powers. One of these—the power to prohibit the use of the public highways in proper cases—the state possesses; and the other—the power to compel a private carrier to assume

against his will the duties and burdens of a common carrier—the state does not possess. It is clear that any attempt to exert the latter, separately and substantively, must fall before the paramount authority of the Constitution. May it stand in the conditional form in which it is here made? If so, constitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect but no less effective process of requiring a surrender, which, though, in form voluntary, in fact lacks none of the elements of compulsion. * * * In reality, the carrier is given no choice, except a choice between the rock and the whirlpool—an option to forego a privilege which may be vital to his livelihood, or to submit to a requirement which may constitute an intolerable burden.

"It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

Similar holdings are found in *Hanover Fire Insurance Co.* v. *Carr*, 272 U. S. 494, 517, 71 L. ed. 372, 383, and in *Power Manufacturing Co.* v. *Saunders*, 274 U. S. 490, 497, 71 L. ed. 1165, 1169.

In *Hanover Fire Insurance Co. v. Carr, supra*, the court said:

> "One argument urged against our conclusion is that the relation of a foreign insurance company to the state which permits it to do business within its limits is contractual and that by coming into the state and engaging in business on the conditions imposed, it waives all constitutional restrictions and can not object to a condition or law regulating its obligations even though as a statute operating in invitum it may be in conflict with constitutional limitations. This argument can not prevail in view of the decisions of this court in well considered cases."

The case of *Western Union Telegraph Co. v. State of Kansas*, 216 U. S. 1, 54, L. ed. 355, was an action by the state of Kansas to oust the Western Union Telegraph Company from the state, so far as local business was concerned, on the ground that the company had refused to pay a privilege tax assessed against it by the state, based upon a percentage of 1/20 of 1% of the entire capital stock of the company, although only a small part of the property of the company was used in Kansas in the operation of its business. The tax consumed the local net profits of the company. The local business carried on in Kansas was barely sufficient to pay operating costs.

The defendant company contended that the tax, being a privilege tax, conditioned to the right of a foreign corporation to do business in Kansas, was exorbitant and confiscatory.

The syllabus of the case declares that the tax was invalid under the commerce clause, and also under the due process clause, of the Federal Constitution. The syllabus,

so far as it refers to the due process clause, is based upon the concurring opinion of Mr. Justice White, whose reasoning is particularly applicable to the case here.

In his opinion Mr. Justice White said that the Western Union had been permitted to come into the state to make its investments, and that the value of its property was dependent upon the operation of its business; that to deprive it of its business, confiscated the value of its property. A license tax exacted of a foreign corporation, he held, after it had been permitted to come into the state and become possessed of property rights within the state, must be reasonable and within constitutional limitations. He pointed out that the theory that such a company had the *election* of withdrawing from the state and ceasing business, or paying the tax conditional to its operation, did not give it the protection of constitutional safeguards. He said:

> "Let me illustrate. The telegraph company has expended in the state large sums of money, adequate for the purpose of enabling it to do both local and interstate business. The investment is there, and its magnitude it is fair to assume, is, in part, a resultant of the requirements of the local business. The continued beneficial existence of the investment depends upon the right to use the property for the purpose for which it was acquired; that is, for both interstate and local business. The state law takes the property, or what is equivalent thereto, imposes an unconstitutional and confiscatory burden, upon the condition that such burden be discharged or the local business be abandoned. What possible election can there be? The property is in the state. It has been invested therein for the very purpose of doing local as well as other business. If the unconstitutional burden be not assumed, local business must cease, and hence the property established for

the purpose of doing the local business becomes worthless and is in effect confiscated. If, on the other hand, the unconstitutional burden be borne, a like result takes place. * * *

"I concede that the corporation, in going in and investing its property within the state, did so subject to the right of the state to exert, as to the property thus in the state, all lawful powers which might be called into play as to property so situated, of the character of that under consideration. But I cannot assent to the correctness of the contention in so far as it asserts that the state may suffer a corporation to come into its borders, invest in property therein, and then, after having allowed, by acquiescence or implied invitation, such a situation to arise, the state may treat the corporation as if it had never come in and its property within the state as if it were wholly out of the state, and despoil the corporation of its rights and property upon such false assumption."

A STATUTE MAY BE VALID AS APPLIED TO ONE STATE OF FACTS AND YET LATER BE INVALID AS APPLIED TO ANOTHER STATE OF FACTS DEVELOPED DURING ITS OPERATION. THE OPERATION AND EFFECT OF THE LAW DETERMINE ITS VALIDITY.

The particular act of which the plaintiffs complain is the levy of the special assessment on December 15, 1928, by the Department of Trade and Commerce, and assessments thereafter to be levied. Plaintiffs claim that through that assessment this board, as agents of the state, were taking, or attempting to take, under color of the statute, the particular property of the banks represented by the assessment without due process of law and for a private purpose.

Whether this is true depends upon the operation of the law at that particular time, even though at a prior time,

or when the law was first enacted, and under other conditions, a special assessment would have been valid and constitutional.

In *Poindexter* v. *Greenhow*, 114 U. S. 270, 29 L. ed. 185, 194, the court, in a case involving certain tax laws of the state of Virginia, said:

> "And it is no objection to the remedy in such cases, that the statute whose application in the particular case is sought to be restrained is not void on its face, but is complained of only because its operation in the particular instance works a violation of a constitutional right; for the cases are numerous, where the tax laws of a state, which in their general and proper application are perfectly valid, have been held to become void in particular cases, either as unconstitutional regulations of commerce, or as violations of contracts prohibited by the Constitution, or because in some other way they operate to deprive the party complaining, of a right secured to him by the Constitution of the United States."

In *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 289, 66 L. Ed. 239, 243, a case involving a statute prescribing conditions upon which corporations might do business in the state, the court said:

> "A statute may be invalid as applied to one state of facts, and yet valid as applied to another. *Poindexter* v. *Greenhow*, 114 U. S. 270, 295, 29 L. ed. 195, 194, 5 Sup. Ct. Rep. 903, 962; *St. Louis, I. M. & S. R. Co.* v. *Wynne*, 224 U. S. 354, 56 L. ed. 799, 42 L. R. A. (N. S.) 102, 32 Sup. Ct. Rep. 493; *Kansas City Southern R. Co.* v. *Anderson*, 233 U. S. 325, 58 L. ed. 983, 34 Sup. Ct. Rep. 599."

In *Galveston Electric Co.* v. *City of Galveston*, 258 U. S. 388, 400, 66 L. ed. 678, 685, the court said:

> "A rate ordinance invalid when adopted may later become valid, just as an ordinance valid when made

> may become invalid by change in conditions. *Municipal Gas Co.* v. *Public Service Commission*, 225 N. Y. 89, 96, P. U. R. 1919C 364, 121 N. E. 772. Compare *Wilcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 53 L. ed. 382, 48 L. R. A. (N. S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; *Newton* v. *Consolidated Gas Co.*, decided March 6, 1922 (258 U. S. 165, ante, 538, 42 Sup. Ct. Rep. 264)."

The rule has been applied to statutes regulating railroad rates.

Smyth v. *Ames*, 169 U. S. 466, 42 L. ed. 819.

The Supreme Court of Ohio, citing decisions of the Supreme Court of the United States, in *Castle* v. *Mason*, 110 N. E. 463, 91 Oh. St. 296, declared, in a case involving the operative effect of an oil inspection law:

> "A law may be within the pale of constitutional authority when originally passed, yet because of its future operations it may directly contravene the organic law."

In Broom's Legal Maxims, p. 159, we read:

> "Cessante Ratione Legis Cessat Ipsa Lex. Reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself."

The general rule stated has been followed in Nebraska.

Cram v. *Chicago, B. & Q. R. Co.*, 84 Neb. 607, 85 Neb. 586.

Davison v. *Chicago & N. W. R. Co.*, 100 Neb. 462.

In the first Nebraska case cited a law regulating the speed of freight trains carrying live stock was held constitutional, and in the second case, six years and a half later, on a different state of facts, was held unconstitutional.

The constitutionality of a law is not to be determined alone by the face of the statute but by its operative effect in the particular instance complained of.

In this connection in *State of Minnesota* v. *Barber*, 136 U. S. 313, 34 L. ed. 455, 458, the court said:

> "It is our duty to inquire, in respect to the statute before us, not only whether there is a real or substantial relation between its avowed objects and the means devised for attaining those objects, but whether by its necessary or natural operation it impairs or destroys rights secured by the Constitution of the United States."

The assessments complained of, levied by representatives of the state under color of the statute, constitute the unlawful taking, and the operative effect of this taking, under the conditions shown at that time, determines the question of constitutionality.

Home Telephone & Telegraph Co. v. *City of Los Angeles*, 227 U. S. 278, 57 L. ed. 510.

Raymond v. *Chicago Union T. Co.*, 207 U. S. 20, 52 L. ed. 78.

The decision of the Supreme Court of South Dakota, in *First State Bank* v. *Smith*, 207 N. W. 467, 49 S. D. 518, which will be particularly relied upon by the appellees in this case, is in violation of the principles announced in the foregoing decisions, and we submit is clearly wrong.

THE CASE OF NOBLE STATE BANK V. HASKELL IS NOT A BAR TO THIS ACTION NOR RES JUDICATA OF THE ISSUES HERE PRESENTED

The issues and questions therein decided are not the ones presented for decision here. If we are right in

the last proposition that the validity of a police regulation is to be determined by its operation under the conditions which exist at the time the protected right is violated, then the doctrine of res judicata cannot apply. The changed conditions are the gist of our case.

At the time of the decision in *Noble State Bank* v. *Haskell* present conditions could not be passed upon, for they were not in existence and no right was then being violated by the law under the conditions which are presented today.

The court will examine the record in the former case to determine the questions essential to its decision of the former controversy.

> *United Shoe Machinery Corporation* v. *United States*, 258 U. S. 451, 66 L. ed. 708.
>
> *Postal Telegraph-Cable Company* v. *Newport*, 247 U. S. 464, 62 L. ed 1215.

A judgment in one suit is not res judicata in a later suit where the issues and questions to be decided are not the same.

> *United States* v. *Southern Pacific Co.*, 259 U. S. 214, 66 L. ed. 907.
>
> *Roberts* v. *Northern Pacific R. Co.*, 158 U. S. 1, 39 L. ed. 873.
>
> *McComb* v. *Frink*, 149 U. S. 629, 37 L. ed. 876.
>
> *Baltimore Steamship Co.* v. *Phillips*, 274 U. S. 316, 71 L. ed. 1069.
>
> *Troxell* v. *Delaware, L. & W. R. Co.*, 227 U. S. 434, 57 L. ed. 586.
>
> *Russell* v. *Place*, 94 U. S. 606, 24 L. ed. 214.

The decision is not res judicata as to those matters and issues which could not have been raised in the former controversy at the time it was tried.

Ash Sheep Co. v. *United States*, 252 U. S. 159, 64 L. ed. 507.

The estoppel of a judgment extends only to the facts in issue as they existed at the time the judgment was rendered, and does not prevent a re-examination of the same questions between the same parties, where in the interval the facts have changed or new facts have occurred which may alter the legal rights or relations of the litigants.

Oman v. *Bedford Bowling Green Stone Co.*, 134 Fed. 64 (Circuit Court of Appeals, Sixth Circuit).

County of Mobile v. *Kimball*, 102 U. S. 691, 26 L. ed. 238.

See cases listed in 34 Corpus Juris, on "Judgments," p. 905.

The issues for determination in this case are not the same as those presented for decision in *Noble State Bank* v. *Haskell*. These issues could not have been presented at that time. The operation of the law under present and changed conditions is the issue in the case, and if the law is to be tested by its operation under the conditions presented at the time of the commencement of this suit, then the decision in the former case is not a bar and is not res judicata of the questions here.

A POLICE REGULATION IS NOT VALID THAT DOES NOT HAVE A CLEAR, REAL AND SUBSTANTIAL TENDENCY TO EFFECT A LEGITIMATE PUBLIC PURPOSE, AND THE EFFECT OF THE STATUTE IN ITS OPERATION MUST, IN A PLAIN, APPRECIABLE AND APPROPRIATE MANNER, TEND TOWARDS THE ACCOMPLISHMENT OF THE OBJECT.

Fairmont Creamery Co. v. *State of Minnesota*, 274 U. S. 1, 71 L. ed. 893.

Burns Baking Co. v. *Bryan*, 264 U. S. 504, 68 L. ed 813.

Meyer v. *State of Nebraska*, 262 U. S. 390, 67 L. ed. 1042.

State of Washington ex rel Seattle Title Trust Co. v. *Roberge*, 278 U. S. 116, 73 L. ed. 210.

See

Weaver v. *Kochn*, 231 N. W. 703 (Neb.), holding a general tax could not be levied to pay depositors in failed banks.

DEPOSITORS IN FAILED BANKS HAVE NO CONTRACTUAL RIGHTS AGAINST THE GOING BANKS NOR AGAINST THE GUARANTY FUND FOR THE RECOVERY OF THEIR DEPOSITS.

Wirtz v. *Nestos*, 200 N. W. 524, 51 N. D. 603.

Standard Oil Co. v. *Engel*, 212 N. W. 822, 55 N. D. 163.

As said in the first case cited, the broad basis upon which the exercise of the police power rests is the safety and welfare of the state and of its citizens as a whole, rather than the interest of the individuals who make deposits in banks, and a depositor has no vested right in a rule of law established through an exercise of the police power.

PAST SUCCESS OF THE BANKS CANNOT SUPPORT A TAKING WHICH WOULD BE CONFISCATORY UNDER PRESENT CONDITIONS.

Newton v. Consolidated Gas Co., 258 U. S. 165, 66 L. ed. 538.

Board of Public Utility Commissioners v. New York Telephone Co., 271 U. S. 23, 70 L. ed. 808.

THE NET EARNINGS OF THE BANKS AFTER PAYMENT OF ASSESSMENTS HAVE NOT SHOWN A REASONABLE RETURN.

Ohio Utilities Co. v. Public Utilities Commission, 267 U. S. 359, 69 L. ed. 656.

Lincoln Gas & E. L. Co. v. City of Lincoln, 250 U. S. 256, 63 L. ed. 656.

McCardle v. Indianapolis Water Co., 272 U. S. 400, 420, 71 L. ed. 316, 329.

THE QUESTION OF WAIVER OR ESTOPPEL

THE FORMAL JUDGMENT OF THE COURT PLACES THE DECISION UPON ONE GROUND ALONE, THAT THE LAW IS CONSTITUTIONAL, AND THIS NOT ONLY INTERPRETS BUT CONTROLS WHAT MAY HAVE BEEN SAID IN THE STATE COURT'S OPINION.

The judgment entered by the state Supreme Court (Rec. p. 58), places the decision on one ground alone: That the law is constitutional and does not deprive the plaintiffs of property without due process of law. The judgment so entered reads as follows:

> "This cause coming on to be heard upon appeal from the district court of Lancaster county, was

argued by counsel and submitted to the court; upon due consideration whereof, the court finds error apparent in the record of the proceedings and judgment of said district court in that, contrary to the findings of that court, the levy of a special assessment upon the state banks pursuant to the provisions of Section 8028, Compiled Statutes, 1922, as amended by Section 26, Chapter 191, Laws of 1923, does not constitute the taking of private property without due process of law. It is, therefore, considered, ordered and adjudged that the temporary injunction granted herein by said district court be, and hereby is, dissolved, the judgment is reversed and the action is hereby dismissed; that appellants pay all costs incurred herein by them, taxed at $....., and have and recover of and from appellees their costs so expended; that appellees pay all costs incurred herein by them, taxed at $.....; for all of which execution is hereby awarded, and that a mandate issue accordingly."

The opinion discusses the question of whether the banks should be heard to complain. It is not clear whether some legal principle is referred to. Nowhere in the opinion is the term "waiver" or "estoppel" used. We do not interpret the opinion as placing the decision in part upon that ground. That was not the intention of the court. We discuss that elsewhere.

It is our contention that the judgment entered *is* the court's decision. It is the formal record of the decision. It states its own ground. The record imports verity. When the judgment is thus clear and final it is not only unnecessary but unavailing to resort to the court's opinion, which under the present rules is a part of the record only in a *qualified sense*, and is resorted to by the reviewing court only when necessary to *aid* in a determination of what has been decided. The judgment

here states its own grounds. We submit such a record concludes that question.

The opinions of the Supreme Court of Nebraska are not required by law to be recorded (Sections 1074-1075, Nebraska Statutes, 1922), and do not become a part of the record in the case, as is true in some states, notably that of Louisiana, in which states the Supreme Court of the United States, even before the amendment, in 1867, of the Federal statutes pertaining to review in the Supreme Court of the United States, considered the opinion as a part of the formal record in the case. See

Williams v. *Norris*, 12 Wheat. 117, 6 L. ed. 571.

Rector v. *Ashley*, 73 U. S. 142, 18 L. ed. 733.

Burt v. *Smith*, 203 U. S. 129, 135, 51 L. ed. 121, 126.

We understand the rule of the Supreme Court of the United States now to be that whether or not the state law makes the opinion of its courts a part of the record, the Supreme Court will examine the opinion and it is considered a part of the record in a *limited sense* only, that is, where necessary for *aiding* in a determination of what was made the basis of the lower court's decision. When the record itself affirmatively discloses this, it is unnecessary to resort to the opinion of the state court.

In one of the first decisions passing upon this question, *Murdock* v. *Memphis*, 87 U. S. 590, 22 L. ed. 429, the Supreme Court of the United States declared, under the new rules adopted after the amendment of the law in 1867, that the opinion of the lower court would be looked into to ascertain the basis of that court's decision so far as the opinion "may be useful in determining that question," and then the court said:

> "But after all, the record of the case, its pleadings, bills of exceptions, judgment, evidence, in short, its record, whether it be a case in law or equity, must be the chief foundation of the inquiry; and while we are not prepared to fix any absolute limit to the sources of the inquiry under the new Act, we feel quite sure it was not intended to open the scope of it to any loose range of investigation."

Following the same rule in *Fire Association of Philadelphia* v. *New York*, 119 U. S. 110, 30 L. ed. 342, the court said that the opinion of the lower court:

> "is transmitted to us with the record, in compliance with our Eighth Rule, for the purpose of aiding in determining what was decided by that court."

In *New York ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63, 73 L. ed. 184, a petition for habeas corpus alleged that the statute involved was "unconstitutional." The specific grounds were not stated nor made clear by the pleading alone. The opinion of the state court, however, showed that a contention was raised and argued upon the demurrer that the law was unconstitutional as in violation of the Fourteenth Amendment. The opinion of the state court was examined for the purpose of aiding in determining what questions were raised and decided, the record, without a resort to the court's opinion, not being clear upon that point. The Supreme Court of the United States in that case, giving recognition to the limited use to which an examination of the opinion would be put, said that the opinion delivered by the lower court "*for present purposes* is deemed a part of the record."

In the case of *Loeb* v. *Trustees of Columbia Township*, 179 U. S. 472, 45 L. ed. 280, the record in the case contained a demurrer to the plaintiff's petition, but the demurrer did not specifically set forth that a constitutional

question was raised and argued. The opinion of the lower court disclosed that a question of constitutionality under the Fourteenth Amendment was properly raised upon such demurrer and decided, and the opinion was referred to by the Supreme Court of the United States as an *aid* in determining the ground of the decision where the record itself was insufficient.

In *Stone* v. *United States*, 164 U. S. 380, 41 L. ed. 477, it is said:

> "We are not at liberty to refer to the opinion for the purpose of eking out, controlling, or modifying the scope of the findings."

In each of the above cases the opinion aided in determining the grounds of the decision, but in no one of these cases was the opinion allowed to refute or contradict the formal record, when the record showed something to have been done not borne out by the opinion.

That distinction is made by the case of *Memphis* v. *Cumberland Telephone & Telegraph Co.*, 218 U. S. 624, 54 L. ed. 1185. In that case the plaintiff's petition affirmatively disclosed that no claim was made that the statute was in violation of the Federal Constitution, although the court's opinion recited that a Federal question had been raised and decided. The Supreme Court of the United States, referring to the allegations of the petition, said:

> "It appears from an examination of the bill that it is distinctly charged therein that the ordinance was passed without authority of the state, and its attempted passage, it is alleged, was an abuse of power by the city. * * * The bill, therefore, so far from charging a violation of the 14th Amendment by an authorized action of the state, distinctly

> and in terms avers that the ordinance was passed without state authority."

Inasmuch as the Fourteenth Amendment protected only against unlawful state action, the bill upon its face did not raise a Federal question. The Supreme Court of the United States in that case held that the opinion, declaring a Federal question had been raised and passed upon, would not be allowed to refute the formal record.

In the case of *Bank of Commerce* v. *State of Tennessee*, 163 U. S. 416, 41 L. ed. 211, it was stated that the written opinion of the state court should not be confused with the judgment actually rendered. In that case the Supreme Court of the United States, in a rehearing, referring to its former decision, said:

> "The error consisted in mistaking a certain statement in a portion of the opinion of the court below for the judgment which it actually rendered."

And in the head notes the rule is stated:

> "No effect can be given to an abstract portion of the opinion upon which no judgment was rendered."

The court said that the opinion could be looked to only—

> "for the purpose of *discovering* the ground upon which the judgment of the court actually proceeded."

It has also been decided that where the record on its face shows that a Federal question was not necessarily involved, and shows that one was not raised, that the opinion of the lower court can be of no assistance and the court will not examine it. In such a case the opinion could only contradict the record.

Otis v. *Oregon Steamship Co.*, 116 U. S. 548, 29 L. ed. 719.

State v. *Board of Liquidation of Louisiana*, 98 U. S. 140, 25 L. ed. 114.

Moore v. *Mississippi*, 88 U. S. 636, 22 L. ed. 653.

As we take it, where the record in the case is clear and needs no aid from an examination of the opinion, then the opinion will not be resorted to. The opinion will not be given an effect contrary to the record, but will be used only as an interpretation and aid in a consideration of the record.

In this case the formal record of the judgment entered by the court has placed the decision upon one sole ground; —that the law is constitutional and that the assessments do not deprive the plaintiffs of their property without due process of law. We do not believe that the written opinion of the lower court can, nor do we believe it was intended by that court to, refute this formal record.

THE OPINION OF THE COURT, ESPECIALLY WHEN READ IN THE LIGHT OF THE JUDGMENT ENTERED, INDICATES AN INTENTION TO BASE THE DECISION ON THE ONE GROUND OF CONSTITUTIONALITY.

In Nebraska it is the syllabus and not the opinion by which the court is bound. This is contrary to the rule in some jurisdictions, and would make inapplicable the decision in *Burbank* v. *Ernst*, 232 U. S. 162, 58 L. ed. 551, holding that ordinarily head notes will be disregarded.

In *Holliday* v. *Brown*, 34 Neb. 232, the court says:

> "There is an unwritten rule in this court that the members thereof are bound only by the points stated in the syllabus of each case. Each judge in the body of an opinion necessarily must be permitted to

state his reasons in his own way, without binding the members of the court to assent to all such reasoning, although they may concur in the conclusions reached."

Although in the body of the opinion the matter of advertisements and of benefits of the law were discussed and the question was asked, whether the banks should now be heard to complain, neither of the terms "waiver" nor "estoppel" is mentioned, the opinion does not anywhere affirmatively base any decision upon that discussion, and the qualified wording of the syllabus, to our mind, is *significant*.

The third syllabus reads as follows (Rec. p. 59):

"Where a state bank has accepted the benefits arising from the deposits of money pursuant to the terms of the bank depositors' guaranty law, such bank should not be heard, in a proper case, to make complaint of a special assessment upon such deposits which has been levied for the benefit of the depositors' guaranty fund."

By this syllabus an abstract rule of law is stated, without a direct application to this particular case. The syllabus declares only that "in a proper case" the acceptance of benefits may prevent the bank from making complaint against assessments. It is obvious that the court was itself unwilling to be bound by that rule as decisive of this case and inserted the qualification "in a proper case" so that the utterance would amount to no more than an abstract statement of law. There is no positive assertion either in the syllabus or in the body of the opinion that this is a proper case within the rule, and that the rule is here applied.

What is said touching upon that subject in the body of the opinion is, first, a reference to what the president

of one of Nebraska's largest banks had said in a publication (Rec. p. 61); then reference to the publications made by some of the banks in 1926 (Rec. p. 61), and a statement that these advertisements were "calculated to attract favorable attention, and the patronage as well, of those having money for bank deposit"; then that a majority of the bankers in the state counted the bank guaranty depositors' fund

> "*in its conception*, a valuable asset, and many *predicted* that this beneficent plan would add greatly to the stability of the state banks."

The court then discusses and disposes of the constitutional question, holding that it is governed by the prior decisions of the Supreme Court of the United States and that the law is constitutional, and then returns to the other question and says

> "But it goes without saying that there never was nor could be any compulsion upon the state banks to accept deposits of money on the bank guaranty basis. But money was accepted by the state banks pursuant to the terms of the depositors' guaranty fund law. . . .
>
> "In view of the benefits arising from the deposits of large sums of money in state banks, pursuant to the terms of the bank depositors' guaranty fund, should the banks now be heard to make complaint of the special assessment of one-fourth of one per cent upon their deposits?"

To that question no answer is given. Had there been intention, even by the author of the opinion, to base decision upon it, a direct answer surely would have been given. It was unnecessary to affirmatively answer it, for the decision that the law was constitutional, just previously decided in the opinion, was determinative of the case, and the matter of waiver, after that conclusion

was reached, was an immaterial issue. We construe this to be only a general argument in the mind of the author of the opinion of the fairness of the decision already determined upon.

In the case of *Rogers v. Hennepin*, 240 U. S. 184, 60 L. ed. 594, a somewhat similar situation was presented. Suit was brought by the members of the Chamber of Commerce of the city of Minneapolis to enjoin the collection of assessments upon the membership, the contention being raised that the assessments were in violation of the Fourteenth Amendment. There were also non-Federal questions raised in defense. A similar case was at that time pending before the same court and had just been decided, holding that the assessments were not in violation of the Fourteenth Amendment. The Supreme Court of Minnesota referred to that case in its opinion and said:

"The decision in that case first herein controls this."

It was urged that so far as the record showed the decision of the state court of Minnesota may have been based on non-Federal ground as well as Federal grounds.

The Supreme Court of the United States construing the opinion of the Supreme Court of Minnesota said that the intention of the court was clear to base the decision upon the former decision which was decided upon the Federal question, and upon such determination found that the Supreme Court of Minnesota had based its decision by referring to the other case upon the sole ground of the Federal question and not upon non-Federal grounds. The court in the opinion said:

"The allusion to that decision as 'controlling' plainly meant that the court thought that all the

reasons urged for a different view were without merit, and that the present tax did not violate the 14th Amendment. It is well settled that where the state court does not decide against the plaintiff in error upon an independent state ground, but, deeming the Federal question to be before it, actually entertains it and decides it adversely to the Federal right asserted, this court has jurisdiction to review the judgment, assuming it to be a final judgment, as it is here.

In this case the intention of the court is likewise made clear by its opinion to base the decision upon the Federal ground, the court in its opinion stating that it is controlled by the former decisions of the Supreme Court of the United States on that question. We think the opinion itself discloses an intention to base the decision upon that sole ground.

A HOLDING THAT THE BANKS IN THIS CASE HAVING ACCEPTED THE BENEFITS ARISING FROM DEPOSITS SHOULD NOT BE HEARD TO COMPLAIN IF CONSIDERED TO BE A GROUND OF THE DECISION BY THE STATE SUPREME COURT IS A GROUND PALPABLY UNFOUNDED BOTH IN FACT AND LAW

The banks in Nebraska did not accept this law voluntarily. The record shows that when the statute was first enacted, a suit was carried by the banks through the Supreme Court of the United States attacking the validity of the law. It is the very judgment in that case which the appellees claim as against all of the banks, is res adjudicata here. When the law was declared valid the banks then had no election but to come under it, and to accept deposits under it, if they continued in the banking business.

For a great many years they operated under this law, supposing, as it was generally supposed by others, that the law would be successful in its operation. The actual test of this law did not occur until the crisis came and was realized. As soon as the banks understood that its successful operation was hopeless, that the scheme was bankrupt, that it was a liability instead of an asset, that it was an injury instead of a benefit, that it was depriving them of their property for no public good, and that it was taking away the protection of their own depositors, then they objected. At that time what election did they have but to object? Only a few of them could qualify to nationalize. They could not cease operation without disastrous effects upon themselves. Van F. Peterson, secretary of the Guaranty Fund Commission, testified that a solvent bank cannot close its doors and liquidate without losing in shrinkage of values an amount in extent equal to its total capital investment. When a bank closes, values go out of its assets (Rec. p. 100, Q. 150).

By the provisions of the law (Section 8029, Nebraska Statutes 1922) a failure to pay the assessments authorized the Attorney General to appoint a receiver. By the amendment of the law in 1925 (Session Laws 1925, Chapter 30, page 122) a failure to comply with the order of the department authorized the department to take possession of the property and business of the bank and place it in charge of the Guaranty Fund Commission.

And so the proposition which finally, under present conditions of operation, confronted the banks was that if they operated under the law they suffered an unconstitutional burden, and if they ceased to operate they sacrificed the values of their properties. When this con-

dition came and was understood, it is not claimed by the appellees that the banks have done anything then to waive their rights. The contention seems to be that since they operated under the law while they, as well as others, thought it was successful, that those previous acts have prevented them from taking a different position under changed facts and when they later found that it was injurious and amounted to an unconstitutional deprivation of property and property rights.

The facts in the case are undisputed, and any conclusion derived from those facts that the banks had waived their rights is an utterly unfounded and untenable conclusion.

All that is left for this court to decide is what conclusion is to be drawn from the given facts.

As we view it, what is contained in the opinion of the lower court with reference to the banks having waived their rights, if interpreted to mean that they have, is untenable in its conclusion and is utterly insufficient to support the judgment and decision in the case, and therefore does not detract from our proposition that the decision in the lower court must be considered to have been based upon the sole ground of a determination of the Federal question.

The question of waiver or estoppel may be a question of mixed law and fact, although we cannot see but that it is a pure question of law in this case because the record presents no issuable facts.

Where the decision of the lower court upon a non-Federal ground is untenable either in law or fact, and a Federal right has been denied, the Supreme Court, as we understand it, will examine into the non-Federal ques-

tion and eliminate it as not being a valid basis for the lower court's decision.

IT IS PROPER THAT THE COURT EXAMINE AND ANALYZE THE FACTS IN THIS CASE PERTAINING TO THE QUESTION OF WHETHER A FINDING OF WAIVER OR ESTOPPEL IS WITHOUT SUPPORT AND UNTENABLE.

In *Cresvill* v. *Grand Lodge K. of P.*, 225 U. S. 246, 261, 56 L. ed. 1074, 1080, the court announced the following rule:

> "(a) where a Federal right has been denied as the result of a finding of fact which it is contended there was no evidence whatever to support, and the evidence is in the record, the resulting question of law is open for decision; and (b) where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to cause it to be essentially necessary, for the purpose of passing upon the Federal question, to analyze and dissect the facts, to the extent necessary to do so the power exists as a necessary incident to a decision upon the claim of denial of the Federal right."

In that case a fraternal lodge, incorporated by act of Congress, was by the lower court enjoined from exercising its charter rights and using its own emblems, on the ground that a complaining fraternal lodge, by the same name and using the same emblems, had exclusive rights thereto. The lower court thus denied the rights of the lodge incorporated by Federal law, and held that the complaining lodge had not lost its right by laches. The Supreme Court examined the evidence in the case, reversed the decision of the lower court, and held there could be no other legal conclusion in the case as applied to the facts but that laches did exist. This gave protection to the Federal right.

A similar case, following and approving the last cited decision and applying the same doctrine, is Recent *Egyptian Arabic Order of Nobles of the Mystic Shrine v. Mechanics*, 279 U. S. 737, 73 L. ed. 931.

In that case the Supreme Court of the United States reviewed the evidence on the question of acquiescence and laches and said:

> "It is our province to inquire not only whether the right was denied in direct terms, but also whether it was denied in substance and effect by interposing a non-federal ground of decision having no fair support."

And the court said, with reference to its own finding on laches:

> "It is apparent that had this view of the question of laches prevailed in the state court the federal right set up by the negro order must have been sustained."

In the case of *Postal Telegraph Cable Company v. Newport*, 247 U. S. 464, 62 L. ed. 1215, the court had before it the question of the constitutionality of a city ordinance, imposing a license tax on the telegraph company of $100.00 a year. The contention made by the company was that the tax was a burden on interstate commerce, discriminatory, unreasonable in amount and denied the equal protection of the law in violation of the Fourteenth Amendment.

The lower court held that the company had accepted the provisions of the ordinance and had become bound by it as a contract, and that this had, furthermore, been determined in a former suit which was *res judicata* of the question. Arriving at these conclusions on the non-Federal grounds, the lower court did not pass upon the Federal question.

The Supreme Court of the United States reviewed the non-Federal grounds, holding that the evidence was insufficient to show that the company had accepted the ordinance so that it had become a binding contract; also holding that the former court's decision on *res judicata* was erroneous, since the complaining company was not in privity with the company which was a party to the prior litigation in which the judgment claimed as a bar was entered. In passing upon the sufficiency of the holding on the non-Federal grounds, the Supreme Court said:

> "But the question arises, whether the basis of fact upon which the state court rested its decision denying the asserted Federal rights has any support in the record; for if not, it is our duty to review and correct the error. * * *
>
> "*Res judicata*, like other kinds of estoppel, ordinarily is a matter of state law, and as the decision of the state court in this case in effect rests upon that ground, this of itself would be sufficient to sustain the judgment against reversal in this court, except for two queries that must first be answered: (a) Is the question of state law, in this case, independent of the Federal questions? and (b) Is the decision reached upon that point sufficiently well founded to furnish adequate support for the judgment?"

And the court concluded as to the holding of the lower court on the non-Federal grounds that:

> "We are of the opinion that the decision reached upon it is so clearly ill-founded that it cannot sustain the judgment."

The court therefore held that the Federal right was subject to review, and remanded the case for the purpose of having evidence taken necessary for proper disposition of the Federal question.

In *Davis* v. *Wechsler*, 263 U. S. 22, 68 L. ed. 143, the court said:

> "If the Constitution and laws of the United States are to be enforced, this court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds."

And in *First National Bank* v. *Hartford*, 273 U. S. 548, 71 L. ed. 767, the rule is thus stated:

> "In a case taken to the Supreme Court of the United States from a state court for review, on the ground that a Federal right was denied, that court is not concluded by a finding of the state court that the asserted right is without basis in fact."

Where the Federal right has been denied as a result of a finding shown by the record to be without evidence to support it, or where the conclusions of law as to Federal right and the findings of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, the court will analyze the facts.

Northern Pacific R. Co. v. *North Dakota, ex rel. McCue*, 236 U. S. 585, 59 L. ed. 735.

In *Truax* v. *Corrigan*, 257 U. S. 312, 66 L. ed. 254, where the facts were set forth in a petition, to which a demurrer was interposed, the court said that it would analyze the facts as averred and draw its own inferences as to their ultimate effect, and is not bound by the conclusion of the highest state court in that regard, and in the opinion the court said:

> **"The facts alleged are admitted by the demurrer, and, in determining their legal effect as a deprivation of plaintiffs' legal rights under the 14th Amendment, we are at as full liberty to consider them as**

> was the state supreme court. * * * In cases brought to this court from state courts for review, on the ground that a Federal right set up in the state court has been wrongly denied, and in which the state court has put its decision on a finding that the asserted Federal right has no basis in point of fact, or has been waived or lost, this court, as an incident of its power to determine whether a Federal right has been wrongly denied, may go behind the finding to see whether it is without substantial support. If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here."

WHERE THE CONCLUSION OF LAW OF THE STATE COURT ON A NON-FEDERAL QUESTION AS APPLIED TO THE FACTS IS CLEARLY WRONG, A DECISION OF THE LOWER COURT, BASED IN PART UPON SUCH CONCLUSION, WILL NOT BAR THE SUPREME COURT FROM THE REVIEW OF A FEDERAL QUESTION PRESENTED IN THE CASE.

A holding in this case that the banks, by an acceptance of past benefits under the law, have waived their rights to raise the constitutional question, is untenable as a proposition of law and the non-Federal ground for that reason is open to review by the Supreme Court and, if found untenable, will be excluded as being no valid basis for the decision.

In the case of *Ward* v. *Love County*, 253 U. S. 17, 64 L. ed. 751, suit was brought to enjoin the collection of taxes assessed against Indian lands, claimed by the defendant Indians to be exempt from taxation under Federal law.

The lower court held that there was a waiver of the constitutional question, holding that the Indians had

voluntarily paid the taxes in spite of the fact that these taxes were collected under coercive means.

The Supreme Court refused to be bound by that conclusion and held that the finding of the lower court that the taxes were paid voluntarily was "without any fair or substantial support," and the court in the opinion said:

> "It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-Federal grounds of decision that were without any fair or substantial support. * * * Of course, if non-Federal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided. *Terre Haute & I. R. Co.* v. *Indiana*, 194 U. S. 579, 589, 48 L. Ed. 1124, 1129, 24 Sup. Ct. Rep. 767. With this qualification, it is true that a judgment of a state court, which is put on independent non-Federal grounds broad enough to sustain it, cannot be reviewed by us. But the qualification is a material one, and cannot be disregarded without neglecting or renouncing a jurisdiction conferred by law and designed to protect and maintain the supremacy of the Constitution and the laws made in pursuance thereof."

In the case of *Union Pacific R. Co.* v. *Public Service Commission*, 248 U. S. 67, 63 L. ed. 131, a state statute, imposing a license fee upon corporations for the privilege of issuing securities, was held void as an unlawful interference with interstate commerce. The railroad company attacking the law, desiring to issue bonds in the amount of over $31,000,000.00, had paid a license fee of over $10,000.00 to the State Board, under protest, for a permit and had acted upon the permit granted.

The lower court held that having invoked its provisions and having procured a grant of authority under it, the corporation was estopped and had waived its right to question the constitutionaliy of the law.

The Supreme Court, in reviewing this decision on the non-Federal ground, held that the action of the corporation in procuring the grant was not wholly voluntary; that the company had no election and was forced to submit to the provisions of the law in order to procure the privilege for something necessarily incident to its proper continuance and operation. The court said:

> "Of course, it was for the interest of the company to get the certificate. It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called."

In reversing the state court and in discussing the non-Federal question the Supreme Court of the United States said:

> "The supreme court of the state avoided this question by holding that the application to the Commission was voluntary, and hence that the railroad company was estopped to decline to pay the statutory compensation. It is argued that a decision on this ground excludes the jurisdiction of this court. But the later decisions show that such is not the law, and that, on the contrary, it is the duty of this court to examine for itself whether there is any basis in the admitted facts, or in the evidence when the facts are in dispute, for a finding that the Federal right has been waived. *Creswill* v. *Grand Lodge K. P.*, 225 U. S. 246, 56 L. ed. 1074, 32 Sup. Ct. Rep. 822. Were it otherwise, as conduct under duress involves a choice, it always would be possible for a state to impose an unconstitutional burden by

the threat of penalties worse than it in case of a failure to accept it, and then to declare the acceptance voluntary, as was attempted in *Hudson, I. & S. P. R. Co. v. O'Connor*, 223 U. S. 280, 56 L. ed. 436, 32 Sup. Ct. Rep. 216, Ann. Cas. 1913C 1050.

The reasoning in that case and in the other cases herein last previously cited are directly analogous to the case here. The banks were put to it to choose between the lesser of two evils, that of going out of business entirely and sacrificing values or of enduring and carrying an unconstitutional burden. The penalty of the statute was that for failure to pay assessment they be placed in receivership, or that they be taken charge of and turned over for operation to the Guaranty Fund Commission. So far as that burden has been carried since conditions have come about whereby the burden has, by reason of the operation of the law, become an unconstitutional one, cannot be said to have been voluntarily carried by the banks, or can it be said that any action of theirs under the law has been such as to amount to a waiver of their rights.

IF A BANK HAS ENCOURAGED DEPOSITS TO BE MADE WITH IT, ITS FIRST DUTY MUST BE TO ITS OWN DEPOSITORS. HOW, THEN, COULD IT BE ESTOPPED BY ITS ACT OF ENCOURAGING DEPOSITS IN ITS BANK FROM LATER PROTECTING THE VERY DEPOSITORS WHICH IT HAD THUS PROCURED.

If the banks in Nebraska have at any time, by stressing advantages of the Bank Guaranty Law, when they thought the law was of benefit to their depositors, and by that action have encouraged deposits in their banks, their first duty is to those depositors; their own depositors. When they learn, by development of conditions,

that further contribution to the Guaranty Fund is injurious to the protection of those depositors, can it be said that they have waived their right to assert this for their protection? Any encouragement that they may have given to prospective depositors could have been upon the assurance that such deposits in their banks were safe. It would be their duty to make them safe. When they find that the payment of assessments by their bank depletes their own assets, takes from the protection of their own depositors to pay another class of depositors, those in failed banks, insecures their own depositors, is injurious to the rights of their own depositors, can it be possible that these banks upon a discovery of the facts, are then estopped because of prior assertions made to make the assertion that the Bank Guaranty Law is injurious, and to take action for the protection of their own banks and their own depositors? In fact, as we view it, it is their *duty* to take such action. Whenever such a bank discovers that the Bank Guaranty Law is no longer a protection but works an injury rather than a benefit, it must be the duty of the bank to disclose that fact to its depositors and to work against the depletion of its own funds, which would result by contributions under such a law.

CONDUCTING BUSINESS UNDER THE GUARANTY FUND LAW WOULD NOT ESTOP THE BANKS FROM QUESTIONING THE VALIDITY OF SPECIAL ASSESSMENTS WHEN THE SAME BECAME CONFISCATORY OR UNCONSTITUTIONAL.

Allen v. St. Louis, I. M. & S. R. Co., 230 U. S. 553, 57 L. ed. 1625.

Union Pacific R. Co. v. Public Service Commission, 248 U. S. 67, 63 L. ed. 131.

THE BANKS, BEING QUASI PUBLIC INSTITUTIONS, AND SO DECLARED BY LAW, BY REASON OF THEIR DIRECT RELATION TO THE PUBLIC WELFARE, CANNOT WAIVE THEIR RIGHT TO EXIST.

The rule is stated in 27 R. C. L. p. 907, as follows:

> "A waiver is not, however, allowed to be operative where it would infringe upon the rights of others, or would be against public policy or morals. Where the object of a law is the good of the public as well as of the individual, such protection to the state cannot, at will, be waived by any individual, an integral part thereof. The fact that the individual is willing to waive his protection cannot avail. The public good is entitled to protection and consideration; and if, in order to effectuate that object, there must be enforced protection to the individual, such individual must submit to such enforced protection for the public good."

With regard to quasi public corporations having public duties to perform, the rule is—

13 Corpus Juris, p. 444:

> "The general rule has been laid down that any contract of a corporation by which it disables itself from performing its duties to the public, or subordinates to its private interests the rights and conveniences which it impliedly undertakes to secure to the community, is invalid as contrary to public policy."

CONCLUSION.

For the reasons above given we submit that the decision of the Supreme Court of the State of Nebraska is erroneous and should be reversed and the injunction allowed.

Respectfully submitted,

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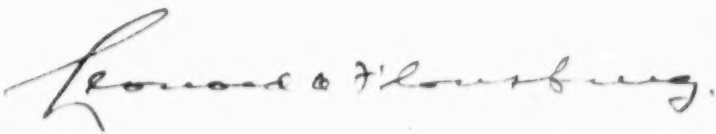

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JAN 17 1931

In the
Supreme Court of the United States

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OCTOBER TERM, 1930

—o—

No. 63

—o—

ABIE STATE BANK,

Appellant,

vs.

ARTHUR J. WEAVER, AS GOVERNOR OF THE STATE OF NEBRASKA; CLARENCE G. BLISS, AS SECRETARY OF THE DEPARTMENT OF TRADE AND COMMERCE; WILLIS M. STEBBINS, AS TREASURER, ETC. ET AL.

—o—

APPEAL FROM SUPREME COURT OF THE STATE OF NEBRASKA

—o—

REPLY OF APPELLANTS AND ANSWER TO INTERVENER'S BRIEF

—o—

34,881

—o—

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In the
Supreme Court of the United States

—o—

OCTOBER TERM, 1930

—o—

No. 63

—o—

ABIE STATE BANK,

Appellant,

vs.

ARTHUR J. WEAVER, AS GOVERNOR OF THE STATE OF NEBRASKA; CLARENCE G. BLISS, AS SECRETARY OF THE DEPARTMENT OF TRADE AND COMMERCE; WILLIS M. STEBBINS, AS TREASURER, ETC. ET AL.

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REPLY OF APPELLANTS AND ANSWER TO INTERVENER'S BRIEF

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34,881

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The defense in this case rests upon the assumption that inasmuch as the state banks operated under the Guaranty Fund Law, they should be held responsible for the consequence of its failure. That law was not inspired by bankers, nor is it a bankers' law. A distinquished Nebraskan, who saw wrongs more clearly than

remedies, conceived the idea of protecting depositors in state banks by compelling them to pay to the state a tax to create a Guaranty Fund. In 1909 the State of Nebraska enacted a law whereby state banks were declared to be quasi public institutions under the supervision and control of the state, and that such banks should pay over to the state a certain sum based on average daily deposits, to create a Guaranty Fund, the purpose of which was to protect depositors in banks. This tax was to cease when the sum for such purpose in the Fund amounted to one and one-half times the average daily deposits, or approximately Three Million and a half Dollars. If the Fund was depleted, then the regular tax was to be resumed with an emergency tax as a relief measure to keep the amount of the Fund intact. Before the law was put into operation, the bank challenged the right of the state to enforce Guaranty Fund contributions, upon the ground that it was taking their property without due process of law.

This court held, in *Shallenberger vs. First State Bank of Holstein,* 219 U. S. 114, that in the exercise of its police power the state had the right to impose a tax to create a Guaranty Fund and to try out the experiment. Since that decision the bankers of this state have been loyal to the law. Some of them believed in it. It was only after the Guaranty Fund had utterly collapsed and when it afforded no protection whatever to their depositors that the banks withdrew their support of the tax and appealed to the court for protection. There was nothing else open to them. The tax must either be enjoined or most of the state banks would be forced into liquidation.

The following facts and statements are not in dispute or have been conclusively proven:

1. The Guaranty Fund is hopelessly insolvent. The deficit as of December 31, 1928, was $15,948,350.11, and the deficit has rapidly increased.

2. The emergency tax is confiscatory, and if continued will force a large majority of the present banks into liquidation. The tax imposed on banks for the Guaranty Fund has amounted to over $1,500,000.00, or 8% per annum upon their capital, for the past eight years. The emergency tax, designed as a relief measure, has become constant. The sums paid into the Guaranty Fund amounted to $16,709,842.11 as of December 31, 1928. As a result of such forced contributions the present banks are loaded with unproductive real estate not used in business of $9,872,647.21, and in addition $4,000,000.00 of doubtful notes which should be charged off, so that every penny of the bank's earnings and resources is necessary to relieve from this real estate burden and to clean the note cases. Two-thirds of the banks paid no dividends to stockholders in 1927 and 1928, and a large number of the banks will have impaired capital if this tax is enforced.

3. Under present conditions the tax takes from the going banks a large sum for the sole purpose of giving it to depositors in banks that have failed.

4. The purpose of the tax, to strengthen banks and to create a Guaranty Fund to protect their depositors, has failed. Instead of strengthening the going banks, it

weakens them. Instead of stabilizing the banking business, it disturbs it. Instead of protecting their depositors, it takes from them assets sorely needed for their protection. Instead of a police regulation for the public welfare, it is a forced contribution to pay the losses of failed banks.

5. The judgment of the Supreme Court of Nebraska in sustaining the tax rests solely upon the ground that such forced contribution does not constitute the taking of private property without due process of law. There was no other ground upon which the decision could rest if the judgment of the trial court was to be reversed.

6. The claims of estoppel or waiver are without merit, as there is no evidence to justify such claims.

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JURISDICTION OF THE COURT

Counsel for defendant urge that this court is without jurisdiction because of non-Federal grounds involved in the controversy. The judgment of the Supreme Court reads:

> "This cause coming on to be heard upon the appeal from the District Court of Lancaster County, was argued by counsel and submitted to the court; upon due consideration whereof the court finds error apparent in the record of the proceedings and judgment of said District Court, *in that,* contrary to the findings of that court, the levy of a special assessment upon state banks, pursuant to the provisions of Section 1828 Compiled Statutes of 1922, as amended by Section 26, Chapter 191, Laws of 1923, does not

constitute the taking of private property without due process of law."

It is clear, accordingly, that the Supreme Court of Nebraska rests its judgment solely upon the ground that the tax in question does not constitute the taking of private property without due process of law.

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HEAD NOTES OR SYLLABI

The head notes or syllabi are supposed to set forth abstract propositions of law which have received the sanction of the Supreme Court. The third paragraph of the syllabus reads:

> "Where a state bank has accepted the benefits arising from the deposits of money pursuant to the terms of the Bank Depositors' Guaranty Law, such bank should not be heard, in a proper case, to make complaint of a special assessment upon deposits which have been levied for the benefit of the Depositors' Guaranty Fund."

It will be observed that the legal proposition is qualified as being applicable to a proper case. It is upon the above statement that defendants rest their claim that the Supreme Court of Nebraska considered and decided a non-Federal question. Certainly, doing business under a law, valid when enacted, does not estop a bank from questioning a police regulation as unconstitutional *when* it becomes unreasonable and confiscatory. To so hold would be to deprive the banks of the very protection which the Constitution affords, and if the State Supreme Court had so held, its decision would be subject to review by this court. Waiver or estoppel applies to acts

or conduct after constitutional rights arise, whereby one has estopped himself from claiming his constitutional rights. The right of banks to claim constitutional protection, arose when the Guaranty Fund became hopelessly insolvent, and the state was attempting thereafter to force contributions for the sole purpose of paying depositors in banks that had failed. It is not claimed that the banks have done anything or said anything since then which can be made the basis of estoppel or waiver. We submit, accordingly, that there is nothing in this record upon which waiver or estoppel can be predicated, and that the judgment of the Nebraska Supreme Court determines the ground upon which the case was decided.

In *Allen vs. St. Louis I. M. S. R. Co.*, 320 U. S. 553, this court said (p. 1031):

> "We deem it to be clear that the right of the complainants to contest the validity of the rates, if, as applied to changed conditions, they were found to be confiscatory, was not impaired by their action in putting them into effect."

In *Cooley on Constitutional Limitations* (7th Ed.) (p. 106), is the following:

> "Asquiescence for no length of time can legalize a clear usurpation of power, where the people have plainly expressed their will in the Constitution, and appointed judicial tribunals to enforce it. A power is frequently yielded to merely because it is claimed and it may be exercised for a long period in violation of the constitutional prohibition, without the mischief which the Constitution was designed to guard against appearing, or without anyone being sufficiently interested in the subject to raise the question, but these circumstances cannot be allowed to sanction a clear infraction of the Constitution."

See also:

Swift & Courtney v. United States, 111 U. S. 22;

Gaar, Scott & Co. v. Shannon, 223 U. S. 468;

Robertson v. Frank Brothers, 232 U. S. 17;

Atchison, Topeka & Santa Fe Ry. Co. v. O'Connor, 223 U. S. 280.

A MAJORITY OF THE BANKS WERE FORCED TO OPERATE UNDER THE GUARANTY FUND LAW OR SUFFER CONFISCATION OF THEIR PROPERTY.

Four hundred and ten of the state banks involved in this suit were engaged in the banking business at the time the law was enacted and had received their charters from the state. Such banks had no option, but must continue in the banking business or liquidate, and liquidation meant confiscation. When a bank ceases to do business, the amounts owing its depositors become immediately due. It takes time, and often a long time, to realize on its assets. To force its debtors to immediate payment results not only in a hardship on them, but often a very considerable loss to the collecting bank.

Mr. Van Peterson, who was Secretary of the Guaranty Fund Commission, and had large experience reaching over ten years in liquidating banks, stated that the loss averaged six times the bank's capital. We submit, accordingly, that a majority of the banks were forced to continue in the banking business under the Guaranty Fund tax or suffer liquidation, which would mean probably the loss of their capital, and in addition a liability

upon their stockholders. To hold the banks might nationalize if they did not wish to continue under the law, is equally fallacious. Many of the banks did not have the requisite capital to nationalize. The state banks, as a rule, serve the farming interests and the stock feeders near small villages or country towns, so that their location is not suitable for national banking. There is no escape from the conclusion, accordingly, that as to 410 of the banks in this controversy, they had to operate under the Guaranty Fund Law or suffer confiscation of their property.

The rule, however, is, as we contend. A quasi public corporation is not deprived of its constitutional protection by engaging in busines, or continuing in business, under a law which seeks to supervise its affairs, and when a police regulation therein *becomes* unreasonable, oppressive and confiscatory, and in violation of constitutional rights, such public institution has the right to claim protection of the Constitution, and to deny it such right under such conditions would be to deprive it of the protection which the Constitution affords.

THE LEVY OF THE TAX INVOLVED HEREIN UNDER PRESENT CONDITIONS VIOLATES THE FOURTEENTH AMENDMENT.

The deficit in the Guaranty Fund at the date of trial was approximately $16,000,000.00. The claims of depositors in failed banks were to be paid with interest in the order of their adjudication, so that a depositor in a failed bank whose claim was *first adjudicated* is entitled to pri-

ority of payment. It is apparent, accordingly, that no possible benefit could accrue to the bank paying, or its depositors, from the tax levied. *The levy of the tax is solely to take property from going banks to give to certain depositors in failed banks.* In their brief (p. 215) counsel for defendant called attention to the Act of the Nebraska Legislature, 1930, with the statement (p. 217) that this court will take judicial notice of the modification of the Guaranty Fund Law by the Nebraska legislature in March 1930. With that statement we agree. Section 1 of that Act provides:

> "DEPOSITORS FINAL SETTLEMENT FUND. For the purpose of providing a fair and just settlement of the claims of depositors and others heretofore authorized to be paid out of the Depositors' Guaranty Fund, there shall be created and established a fund to be known and designated as 'Depositors' Final Settlement Fund', which fund shall comprise and consist of the following:
>
> (c) All property, moneys, funds, proceeds, rights, credits, accounts and choses in action of every kind and nature constituting, derived from, arising out of, or in any manner connected with or pertaining to the assessments, regular and special, heretofore accrued and levied against any and all corporations transacting a banking business in this state, for the purpose of establishing, maintaining or reimbursing what was formerly designated as the Depositors' Guaranty Fund of the State of Nebraska, which assessments, more specifically, are the special *assessments* levied by the Department of Trade and Commerce on or about *December 15, 1928*, April 17, 1929, and January 2, 1930, and the regular assessments accrued and levied on or about July 1, 1929, and January 1, 1930.

"SECTION 2. DEPOSITORS' FINAL SETTLEMENT FUND-ASSESSMENTS. For the purpose of providing a fund for depositors in state banks closed prior to the time this Act goes into effect, every corporation engaged in the business of banking under the laws of this state shall be subject to assessment to be levied, collected and applied as in this act provided. On the first day of January of each year during the period of ten years beginning with the year 1931, and ending with the year 1940, inclusive, the Department of Trade and Commerce shall levy upon every state bank an assessment of two-tenths of one per cent of its average daily deposits during the year ending December 1st last preceding, as shown by the statements required to be made and filed with the Department. * * *

"SECTION 5. DEPOSITORS' FINAL SETTLEMENT FUND-CLAIMS. Only owners and holders of the following described claims and rights shall be entitled to receive payment from the Depositors' Final Settlement Fund and to participate in the benefits thereof, to-wit:

"1. Unpaid claims of depositors and of others entitled to priority, as by law provided, which shall have been heretofore or hereafter adjudicated against insolvent state banks of this state, including those banks which have heretofore closed and those which hereafter and prior to the time this Act goes into effect, shall have been closed by the Department of Trade and Commerce; Provided, such claims as have been heretofore certified to the Department as claims against the Depositors' Guaranty Fund, or shall have been heretofore certified to the Department as claims entitled to the benefits of the Depositors' Final Settlement Fund.

"SECTION 16. REPEAL. That said Sections 7995, 8008, 8028 and 8033 Compiled Statutes of Nebraska, 1922, as amended; Sections 22 and 23, of Chapter 191, Laws of 1923; Sections 8024, 8025, 8026,

8027, 8009 and 8035 Compiled Statutes of Nebraska, 1922, as heretofore existing are hereby repealed.

"SECTION 17. INDUCEMENT. The inducement for the passage of Section 16 of this Act, which repeals various sections of the statutes relating to the Bank Depositors' Guaranty Fund and assessments therefor, is the passage of Sections 1 to 5, inclusive, of this Act, and if any one or more of said Sections 1 to 5, inclusive, of this Act, shall for any reason be held unconstitutional or invalid in whole or in part, then and in that event said Section 16 of this Act shall be invalid and of no force or effect, and the sections of the statutes sought to be repealed by Section 16 shall be in full force and effect."

It will be observed that Section 8028, under which the tax involved herein was levied, has been repealed, and the tax involved herein, with the subsequent tax for the year 1929 and January 1, 1930, together with the regular assessments of July 1, 1929, and January 1, 1930, are to go into a Depositors' Final Settlement Fund to be distributed only to depositors in banks which have failed prior to March 1930, so that the only purpose of the emergency tax is to take assets from going banks to give to depositors in banks that have failed. The legislative Act of March 1930, did not change the status of the banks with respect to the payment, because under the law in force in Nebraska at the time, every penny of the tax levied against the banks or the Guaranty Fund was to go to depositors of banks that had failed, in the order of priority of adjudicated claims, and hence such payment was directly taking the property of the banks and the security of their depositors to give to depositors of failed banks.

The legislative Act of 1930, however, changed the rule of priority and attempts to distribute such assessments among all the depositors of banks which failed prior to the passage of the Act.

In *Ochoa v. Morales*, 57 Law Ed. 1437, Justice Pitney uses the following:

> "Whatever else may answer to the definition of the term 'Due process of law', all authorities agree that it inhibits the taking of one man's property and giving it to another contrary to the statutes, usages and modes of procedure, and without notice or opportunity for hearing."

In *Daugherty v. Thomas*, 140 N. W. 619, the court says:

> "The bills of rights in the American Constitution forbid that parties shall be deprived of property except by the law of the land, and if the prohibition had been omitted a legislative Act to pass one man's property over to another would nevertheless be void."

In *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393 or 67 Law Ed. 322, this court, through Justice Holmes, said:

> "The general rule at least is that while property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking * * * It is not plain that a man's misfortunes or necessities would justify his shifting the damages to his neighbor's shoulders."

It can hardly be questioned, accordingly, that under present conditions the levy of the emergency tax against going banks to pay depositors in failed banks violates the Fourteenth Amendment.

ADVERTISING BY BANKS THROUGH SIGNS CONTAINING THE WORDS "DEPOSITORS IN THIS BANK ARE PROTECTED BY THE GUARANTY FUND OF THE STATE OF NEBRASKA", AND BY STAMPING ON CERTIFICATES OF DEPOSIT: "DEPOSITS IN THIS BANK PROTECTED BY GUARANTY FUND IF INTEREST IS NOT PAID IN EXCESS OF 4% PER ANNUM."

Page 33 of defendant's brief contains the following in italics:

> "The only legal requirement of the banks was to hang a certificate in their bank to the effect that they had complied with the provisions of the law."

Section 7995 of the Laws of 1922 as amended by Senate File 60, 1925 Session Laws, provides:

> "REPORT—TO OBTAIN GUARANTEE FUND CERTIFICATE. Every corporation hereafter organized for transacting a banking business under the laws of this state, shall file with the Department of Trade and Commerce a full, complete and detailed report of this article, and the Department upon examination of the report and approval of the same, if satisfied that such corporation has complied with the requirements of this article, shall issue to said banking corporation a certificate stating that said banking corporation has complied with the laws of this state for the protection of bank depositors, and that its depositors are protected by the Depositors' Guarantee Fund of the State of Nebraska. Every banking corporation receiving such certificate shall conspicuously display the same in its place of business and said banking corporation may print or engrave upon its stationery words to the effect that its depositors are protected by the Depositors' Guarantee Fund of the State of Nebraska. Provided, that after April 1, 1926, said banking corporation shall only print or engrave upon

its stationery or in any advertising refer to the Guarantee Fund in words as follows:

"'Depositors in this bank protected by Guaranty Fund if interest is not paid in excess of four per cent per annum'. The printing or engraving by any bank of a false statement advertising such guarantee is hereby declared to be a violation of the provisions of this Article."

In granting a charter to a State Bank, the State gave a certificate which contained the words: "Depositors in this bank are protected by the Guaranty Fund of the State of Nebraska", and the law compelled the banks, under penalty of forfeiture of their charter, to display that certificate in a conspicuous place. The purpose of the certificate is plain. The State desired depositors in state banks to be informed that in addition to the assets of the bank they had security in a Guaranty Fund held by the State of Nebraska. In displaying signs in the bank to the effect that their depositors were protected by the Guaranty Fund of the State of Nebraska, the banks were merely complying with the spirit of the law, and hence should not be subject to criticism, especially from state officials.

With respect to the stamp on certificates of deposit, the law specifically provided that after April 1, 1926, a state bank shall only print or engrave upon its stationery, or in any advertising refer to the Guaranty Fund in words as follows:

"Depositors in this bank protected by Guaranty Fund if interest is not paid in excess of four per cent per annum."

Hence in stamping certificates of deposit with the above words, the banks were merely complying with the mandatory provisions of the statute. It is absurd to claim that a bank is estopped from questioning the validity of the emergency tax under present conditions, because of displaying signs in the bank, to the effect that: "Depositors in this bank are protected by the Guaranty Fund of the State of Nebraska", when the statute required the Bank to give such notice to its depositors.

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ARTICLES IN THE OMAHA BEE-NEWS DURING THE SUMMER OF 1926.

Why the state banks should be criticised by the defendant for newspaper articles in the Omaha Bee-News is difficult to understand. The criticism should be reversed.

In 1926 the Banking Department of Nebraska was disturbed because of the collapse of the Guaranty Fund in South Dakota. A conference was held between Mr. Wilson, advertising director of the Omaha Bee-News, and the Banking Department in Lincoln. It was there deemed advisable to print a series of articles lauding the beneficent effects of the Guaranty Fund in Nebraska. The articles were prepared and submitted to the Banking Department and received their approval. Some fifteen bankers were then called in a conference at Fremont to consider such

advertising. Mr. Griggs, who at that time was the head of the Banking Department, and Mr. Wilson, were present. The bankers were there advised that the Department desired the publication of such articles. 353 of the 839 banks then in existence agreed to pay for the publication. The articles were accordingly published. The published articles were the joint work of Mr. Wilson and Mr. Ballard Dunn, of the Bee-News, and Mr. Van Peterson, Secretary of the Guaranty Fund Commission, and Kirk Griggs, Secretary of the Department of Trade and Commerce. Not a single banker contributed one line or suggestion towards the published articles, unless possibly Mr. Stephens, and the only part the bankers took in the matter was to pay for the same at the suggestion of the Department of Trade and Commerce.

With respect to the conference at Fremont, Mr. Stephens' testimony is as follows:

Q. Who submitted the advertising?

A. They were presented to us by the Editor of the Omaha Bee, Mr. Ballard Dunn, his assistant Mr. Leo Wilson, and they were accompanied by Mr. Griggs of the Banking Department.

• • • •

Q. Were the advertisements drawn at that time?

A. Yes, they were all drawn, and some of the art work was submitted also.

Q. Do you know whether the information contained in those advertisements was gone over by Kirk Griggs at that time?

A. Yes, it was gone over by him. He sat with us in conference, and each line and paragraph of the

advertisements was read, examined and approved.

Q. Had you ever seen any of that material before that day?

A. No, I had nothing to do with preparing it. (Record p. 517).

Q. Was anything said as to who furnished the material for the advertisements?

A. We were assured by Mr. Wilson that the advertising data was all being secured in Lincoln from the Banking Department and the office of the Guaranty Fund Commission. (Record p. 518).

Mr. Schantz' testimony is as follows:

Q. Your attention has been called to articles published in the Omaha Bee in 1926, you remember the newspaper articles?

A. Yes.

Q. State what part, if any, you took as to giving the information contained in those articles?

A. I gave none of the information.

Q. Did you have anything to do with the preparation of those articles?

A. No, sir.

Q. You knew of their publication?

A. Yes, but I was not very much in sympathy with the matter, in fact, I objected from the first.

Q. Were you informed as to who was to give the data for the publication of these articles before their publication?

A. Yes.

Q. Who?

A. The Secretary of the Department of Trade and Commerce, Mr. Kirk Griggs, and the Secretary of the Guaranty Fund Commission, Mr. Peterson. (Record pp. 594-595).

It is not claimed that the newspaper articles contained any false statement of facts. It is said they gave an assurance to the public that the Guaranty Fund would not fail. Are the state bankers to be held liable because some banker, or newspaper or state official, has expressed an opinion that the Guaranty Fund would never fail? If any one has a right to complain of the newspaper publications, it is the state bankers of Nebraska. Before the articles were published, the Department of Trade and Commerce gave out information to the effect that the Guaranty Fund was solvent and that the levy of emergency taxes would be practically over in one or two years at most.

Mr. Stephens testified that on April 22, 1925, at Fremont, Mr. Kirk Griggs, Secretary of Trade and Commerce, spoke before the bankers, and in that speech stated that the net loss would be approximately $3,000,000.00. (Record p. 515). And later on October 22, 1925, Mr. Griggs repeated that statement. (Record p. 516). This is confirmed by the report of the Secretary of the Guaranty Fund Commission as to the condition of the Guaranty Fund as of June 30, 1926, in which the deficit is stated as $2,715,999.12. (Record p. 129). As against this deficit there was a stockholders' liability in excess of $3,000,000.00. The close of the report of Secretary Peterson contains the following:

> "The average loss per bank closed is continually growing less, and we do not feel there will be a very large number of banks yet to be closed in which there will be a loss to the Guaranty Fund. (Record p. 130).

In reliance, accordingly, upon statements received from the officials of the Banking Department that the deficit in the Guaranty Fund in 1926 was less than $3,000,000.00, and this was partly covered by stockholders' liability, and there would be few further failures, the bankers paid the assessment for 1926 and 1927 and the first half of 1928. The banks of Nebraska had no means of knowing the real condition of the state banks and that the deficit in the Guaranty Fund would ultimately reach more than $20,000,000.00. They were assured by the Secretary of the Department of Trade and Commerce that the troubles of the Guaranty Fund were over. They relied upon the statements of the Secretary and paid into the Guaranty Fund enormous sums, whereas if the truth had been known that hundreds of banks would of necessity fail, the solvent banks of this state would have ceased to contribute to the Guaranty Fund. While depositors in failed banks may have been deceived through the false security of the Guaranty Fund, the banks have been the real sufferers, for they have contributed millions of dollars to pay the losses of failed banks during the period of deflation, when they needed every dollar of their assets to protect their own deposits, thereby weakening their capital investment to a degree that they can no longer contribute to this unjust tax and remain solvent. The claim that the banks are estopped and should be penalized because of advertisements appearing in newspapers and in pamphlets is utterly without merit, for if any one

is to blame for the newspaper articles, it is the Department of Trade and Commerce, who sponsored the publications and gave to them their approval.

UNDER PRESENT CONDITIONS THE TAX IS CONFISCATORY.

Criticism is made because the plaintiffs offered, as proof of the present condition of the banks, data taken from the published statements required by the law to be made. If all this evidence should be set aside the result would be the same. The trial court found, and the decree so states, that each of the special assessments provided for by Section 8028, under present conditions, is unjust, oppressive, unreasonable in amount, and confiscatory of the earnings and property of the plaintiff banks and of the banks in behalf of whom this suit is brought. No other finding would have been justified. From the evidence offered by defendant, such a conclusion follows.

Page 89 of defendant's brief referring to the dividends for 1927 and 1928, contains the following:

> "The banks actually paid dividends for the 18 months of $1,407,268.00, which was an average for all the banks of 7.45% on the capital of $18,875,500.00, and 5.62% on the total capital and surplus of $24,958,557.00.

FIGURED ON AN ANNUAL BASIS THE PERCENTAGE WOULD BE REDUCED ONE-THIRD.

This would leave the return to the banks on invested capital of only 3.75% per annum.

The statement of defendants, however, upon which the percentage is based, is not correct, as per Exhibit "10" shown in their brief. (p. 56). For the year 1927 the capital stock is $20,648,500.00, while the combined assets, capital stock, surplus and net undivided profits, is $29,053,971.06, and for the year 1927 the capital stock is $19,001,000.00, and the combined assets, capital stock, surplus and undivided profits is $27,976,756.00, so that the actual net earnings of all the banks for the year 1927 and the first half of 1928 did not exceed 3% upon invested capital. It can hardly be claimed under such conditions that the emergency tax is not confiscatory.

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THE EMERGENCY TAX IS NOT ONLY CONFISCATORY BUT DESTRUCTIVE OF THE BANKING SYSTEM.

The real financial condition of the banks is shown conclusively by facts that are not in dispute. In December 1928, the 726 state banks carried real estate, other than that used in business, to the amount of $9,872,647.21. (Defendant's brief p. 56). In addition the banks carried $4,000,000.00 of notes which had been ordered out by the Banking Department as worthless or of doubtful value. Under the testimony of Mr. Peterson, with an experience of ten years, such real estate had a realizable value of 43 percent. The above real estate was forced upon the banks in an attempt to save losses from insol-

vent dobetors. The capital stock of the banks was $19,-100,000.00 in 1928. The surplus and undivided profits amounted to $6,075,741.87, plus $2,900,014.22, or a total of $8,975,756.09. If the banks were compelled to cash in real estate as the law requires, and to clean the note cases of doubtful or worthless notes, it would practically wipe out their entire surplus and undivided profits, so that the tax involved herein with the increased assessments for years 1929 and 1930, which are set aside for Depositors' Final Settlement Fund, would seriously impair the capital of the banks, and as Mr. Bliss, Secretary of the Department, stated, force two-thirds of the banks into liquidation. The evidence, even with regard to the State Bank of Omaha, which is referred to as one of the prosperous banks and is concededly well managed, does not justify the tax involved herein. That bank was organized in 1912, the year after the Guaranty Fund tax began to function. There was paid in at the time $300,000.00 capital, $37,-500.00 surplus, and later there was added to the surplus $50,000.00 realized from the sale of a lease. No dividends were paid from 1912 to 1918. From 1922 to 1928 the bank paid 10% dividend on its capital stock, or 6 percent dividend on its capital and surplus. During its entire existence it has paid $294,000.00 dividends, and has paid into the Guaranty Fund $394,000.00, or $100,000.00 in excess of the dividends paid to its stockholders. Two-thirds of the banks of Nebraska paid no dividend whatever to the stockholders during 1927 and 1928, and a large number of the banks must show impaired capital if the Guaranty Fund assessment is to be enforced. It is idle to assert, under present conditions, that the emergency tax is not confiscatory.

ONE-HALF NEBRASKA STATE BANKS HAVE FAILED SINCE THE EMERGENCY TAX BECAME CONSTANT.

Exhibit "16" (Record p. 306) gives the number of state banks taken over by the Department of Trade and Commerce from 1920 to December 31, 1928, at 265. The emergency tax became constant from 1921 until it was repealed in 1930, so that 261 banks have failed out of a total of 1010 doing business in 1921. In addition, 242 banks have been compelled to make an assessment on capital stock in the sum of $2,106,682.15, so that 503 of the 1010 state banks have become insolvent since the emergency tax has become constant.

During the period from December, 1921, to December, 1928, there has been paid into the Guaranty Fund $13,-167,855.98. What stronger evidence could be offered that the emergency tax is confiscatory and destructive of the banking system? It has been urged that the deflation period or panic of 1920 and 1921 was the cause of so many bank failures. In part this is true, but it must be conceded that taking from the banks over $14,000,000.00 since 1920 to pay the losses of failed banks during a time when each bank needed all of its assets to protect its own depositors has been a contributing cause and a large one, to the failures.

It is urged that the Guaranty Fund has been a great benefit to the state banking system. Possibly it may have increased deposits in state banks to some extent, although this is doubtful. State banks were permitted to receive public moneys on deposit without a security bond while the Guaranty Fund was intact but such privilege was withdrawn as soon as the fund became insolvent. What-

ever benefit the banks may have received from a Guaranty Fund ceased when the condition of the Guaranty Fund as insolvent became known in the summer of 1928. It can hardly be claimed accordingly that the Guaranty Fund tax has been a benefit to the state banks in view of the fact that one-half of them failed under its operation and most of the remainder are in a precarious condition because of the large enforced contribution during the past eight years to pay the losses of failed banks. Certain it is that under present conditions the emergency tax is destructive of the banking system and harmful to the general welfare.

———o———

INTERVENERS' CONTENTION

On page 48 of their brief, intervenors say:

"Many of the seven hundred thirty eight banks in the state are in a *most* unsatisfactory condition. A great quantity of worthless assets has been accumulated in the banks. These worthless assets will represent great losses to the banks and they originated during the period of inflation and speculation which accrued after the war."

Again, Brief page 46:

"Appellees respectfully submit if the court shall find that there is a contract between interveners and the banks and that interveners have accrued rights under this contract, although it may be decided by reason of present conditions that the Act has no substantial relation to the public welfare, nevertheless the accrued rights of interveners should be recognized under the record in this case and the enforcement of these rights made possible."

Again, Brief page 40:

> "These interveners as depositors in failed banks are parties to the prescribed contract and have a pecuniary interest in the payment of the assessments by the banks, and they have the right to demand that payment of these assessments be made to the Fund by the banks until all accrued liabilities are liquidated."

Again, referring to the Act of the legislature of Nebraska of March 1930, intervenors said:

> "These intervenors, as a matter of law, must be permitted to question the propriety and legality of the Settlement Fund should they so elect, in a proper proceeding instituted in a proper court."

The position of the intervenors is clear and their statements frank. They claim that the legislative act, providing for a Guaranty Fund, created a direct obligation between the banks and depositors in failed banks to pay their losses, so that neither court nor legislature can relieve the banks until the losses are fully paid, even though the result will be the wrecking of the entire state banking system of Nebraska.

Under present conditions the enforcement of the emergency tax will result in paying intervenors in full and depositors in failed banks who have been fortunate enough to obtain priority of adjudication of their claims. The deficit in the Guaranty Fund is so great that the interest alone cannot be paid, so that it is certain a part only of depositors in banks that have already failed will receive anything from such construction of the law. With respect to present depositors in banks, intervenors are frank enough to say they have no concern, and as the 738 banks are in a most unsatisfactory condition, having

a great quantity of worthless assets which will represent great losses, it follows that the present depositors in banks must suffer heavily if the tax is to be enforced.

What have the state bankers done to be penalized with the loss of all their investments, and what have present depositors in banks done that their security should be taken from them? 410 of the state banks had received their charters when the Guaranty Fund law was enacted, so that such banks were forced to do business under that law or lose their investment. The remaining banks took out their charters under the Guaranty Fund Act. By that law the state undertook the supervision and control of the state banking business under a department created for such purposes. The affairs of banks were to be thoroughly examined by examiners selected by the state as often as the department might require. The acts specified conditions under which loans could be made so as to safeguard the banks' investments. No bank was to be chartered until the department of banking should be satisfied that the parties requiring said charter were parties of integrity and responsibility and that the public necessity, convenience and advantage would be promoted by permitting such bank to engage in business. (Section 7997) No person was to be permitted to become an executive officer of a bank until he had obtained a license to so act and executive officers were required to be persons of good moral character, known integrity, business experience and responsibility and capable of conducting the affairs of the bank on sound banking principles, and whenever the department upon investigation should be satisfied that an active executive officer was conducting the bank's business in an unsafe or unauthorized manner

or endangering the interests of the stockholders or depositors, it was its duty to revoke the license of such executive. *No one can truthfully say that the present banks are in the slightest way to blame for the failure of the Depositors' Guaranty Fund for the entire responsibility and control of the state banks was taken over by the state.*

The Depositors' Guaranty Fund was declared to be: "For the purpose of providing a Guaranty Fund for the protection of depositors in banks." To each bank was issued a certificate with the seal of the state containing the words: "*Its* depositors are protected by the Depositors' Guaranty Fund of the State of Nebraska". Such were the inducements held out to those who desired to engage in the state banking system in the State of Nebraska.

Conceding for the purpose of argument only that the law imposed a contractual obligation upon the part of a bank to pay the assessments called for therein, the same statute which required the bank to pay such assessments promised a Guaranty Fund which would stand as a protection to its depositors and give stability to the banking business. The benefits promised were as much a part of the law as the obligation to pay the assessments. Should the Banks be compelled to continue contributions, when there is no longer any protection to *their* depositors in a Guaranty Fund? Is it not the law rather than when the enforced contributions no longer yield the promised benefits the right to exact them ceased? To hold that banks must continue to pay enforced contri-

butions which are confiscatory and destructive of their business when no benefit whatever inures to the paying banks or to the public, is to require an unjust thing. If there was a contract obligation on the part of the banks to pay the emergency tax, such obligation ended when the Guaranty Fund became insolvent and afforded no protection whatever to the paying banks' depositors. We submit, accordingly, that the legislative act did not create an obligation upon the part of the state banks to continue to pay the emergency tax *after* the Guaranty Fund was *insolvent*. It would be shocking to our sense of justice to require the banks to continue these large forced contributions to pay the losses of banks which have failed through no fault of the present banks, when the inevitable effect would be to wreck the banking system and cause untold losses to the present depositors in banks.

THE OPERATION OF THE LAW HAS NO TENDENCY TO ACCOMPLISH A PUBLIC PURPOSE.

Appellees, in their brief, insist upon assuming that the question before this court is one only of economic policy, and that the court will therefore not attempt to measure or weigh the merits or wisdom of the law. In taking that position they stop far short of the real question that is involved here.

When the law was originally enacted it is true that the question of its policy and proprietary and economic justification was then a question for the legislature. The law then necessarily had to be considered in the light of its contemplated operation and effect. What that would be was then a matter of conjecture. But after twenty

years' experience under the law, the question is not now an economic one or a question of policy. A definitely proven condition exists. The settled and undisputed facts allow of no leeway nor speculation but present a definite condition for the application of legal principles.

Appellees say (p. 195):

> "The Guarantee Fund Law has *heretofore* been finally determined by the United States Supreme Court to have a rational relation to the public good." And on page 158:
>
> "If the law has failed to accomplish its purpose, that may be a cogent reason for its repeal by the lawmakers, but it can have no weight with the court in construing it."

In these statements appellees lose sight of, and fail to apply, the well recognized rule, set forth at the top of page 79 of our original brief, that a police regulation, in order to be valid, must not only *have* a legitimate public purpose but in its *operation* it *must, in a plain, appreciable and approximate manner, tend towards the accomplishment of that purpose.*

Appellees are satisfied to stop with the statement that this court has once held, on the premise of the contemplated operation of the law, that the law then operated for a public purpose. They do not answer the question, but are willing to avoid it as to whether the law at this time, in its operation, tends in any way towards the accomplishment of its original purpose. As to that fact they would have to admit that it does not. They do not argue that point.

The condition is undisputed. The banks receive no reciprocal benefits from the payment of the assessments. The assessments now exacted do not tend to protect the depositors in going banks, but destroy their protection. The imposition of these assessments against the banks does not create public confidence nor lend stability to banking, but has the opposite effect. The public knew at the commencement of this suit that the claims of depositors against failed banks was some $26,000,000.00; that the deficit in the Guaranty Fund was some $16,000,000.00; that the assessments were insufficient to more than pay the interest on adjudicated claims; that whatever was collected by assessments would be taken away from the operating banks, without benefit to them, without giving protection to their depositors, and would be paid to the depositors in banks long since failed. Such a condition jeopardizes the present banks and creates loss of confidence in banking.

The assessments now imposed bear no relation to current losses. The funds derived through these assessments are not paid to the depositors in banks which are failing during the period covered by the assessment. By the law there is no provision tying up current losses with current assessment so that present depositors can have any expectancy of benefits through the assessments. The assessments go to pay the claims of depositors in banks which have long since failed, and the deficiency in the Guaranty Fund, even were the special assessments indefinitely continued, is such that proceeds from assessments can never catch up with the losses so that under

the operation of the law current assessments will be related to current losses.

The operation of the law, without dispute defeats its object. That this is true is not open to argument. It is a fact which must be conceded from the record. It is a fact which the appellees do not dispute, but the answer of the appellees is that the court should not consider it. Do we not have the right to have the court consider the fact, which indisputably exists, that the operation of the law bears no rational relation to the object originally sought to be attained, but, on the other hand, defeats that very object? If that fact is true, as we have asserted it, we submit that the law is no longer constitutional.

The Supreme Court of Nebraska has rendered a decision, referred to in our brief on page 79, *Weaver v. Koehn*, 231 N. W. 703, (Neb.), in which to our minds they have taken a position diametrically opposed to the conclusion reached by that court in this case of *Abie State Bank v. Weaver*.

In the case of *Weaver v. Koehn* the court had before it a statute of the Nebraska legislature appropriating against the general funds of the state an amount of $260,111.34 to pay the depositors in banks that had failed, the deposits having been made in the banks while being operated by the state department, the Guaranty Fund Commission. The ~~conclusion~~ was made in that case that the state Guaranty Fund Commission, under the Guaranty Law, having operated these banks and accepted these deposits during operation by the state, was morally ob-

ligated at least to pay the claims of these depositors. The Supreme Court in that case held, however, that a tax to meet such appropriation was not for a *public purpose* and that therefore the act making the appropriation was unconstitutional.

The lower court in that case had held that the act was offensive to the due process provision of the Constition and was not for a public purpose, and that the appropriation involved the taking of property of the public generally for the relief of private persons, without obligation on the part of the state, either legal or moral.

In the course of the opinion the Supreme Court of Nebraska said:

> "But the appropriation of money by the state, to reimburse depositors for losses sustained by them, in failed banks, clearly appears to be the taking of money belonging to one class to pay the claims of those of another class. And this is in violation of the due process provision of the Federal and State Constitutions. Clearly it has not yet come to pass that the state, in its supervision of the banking business, has become an eleemosynary institution.
>
> In view of the facts as presented, it clearly appears to us that the losses of individual depositors in state banks cannot lawfully be made up nor paid from the appropriation of money that belongs to all of the people of the state. The deposits herein were merely business transactions between the bank and the depositor, and the public should not be made to pay for the losses that a depositor may have suffered in such transactions."

The court then quoted from Gray's Limitations of Taxing Power, 123, Section 170, as follows:

> "The state exists for the benefit of all; any devotion of its powers to merely private ends is such a perversion of its purposes and duties as to be utterly void; and it is the duty of the judicial agents of the state to protect the community from such perversion."

We submit that the operation of the Guaranty Law, as to the banks appealing in this case, is not in any particular different from the operation of the law under the statute so held to be unconstitutional and to be in violation of the due process clause of the Federal and State Constitutions.

In the operation of each of these laws there is now no public purpose served. The same rule to determine whether a public purpose exists would apply to each case. If the payment of the depositors in the banks that failed while operated by the state bore a rational relation to stabilized present banking, to the protection of present depositors, to the prevention of panics and runs on banks, then the law would have served a public purpose and necessarily would have been sustained; it would then have been sustained especially in view of the fact that the legislature may meet the moral obligations of the state. But the payment of these depositors served no public purpose and the law was declared unconstitutional, for, as the Supreme Court of Nebraska said, clearly this:

> "appears to be the taking of money belonging to one class to pay the claims of those of another class."

Just so does the Guaranty Law now take the money of the banks, and take away from the present depositors of those banks their protection, in order to pay the de-

positors in banks that have long since failed. It takes from one class and pays to another. It deprives one class of individuals of protection and benefits another class of individuals, and no public purpose is served thereby.

WE TAKE THE VIEW THAT BOTH REGULAR AS WELL AS SPECIAL ASSESSMENTS ARE ILLEGAL.

The appellees declare in their brief, in their heading on page three, that the appellants question only the special assessments and do not attack the other sections of the Guaranty Fund Law.

In that statement the appellees are mistaken. At the commencement of this suit the only assessments at that particular time sought to be collected were the special assessments. The suit was brought, enjoining collection of those assessments, they being the only ones whose collection was immediately threatened.

It is our view that this case tests the validity of the entire operation of the law, both as to regular and special assessments, since it tests the principle which determines not only whether excessive collections can be made but whether any collections whatsoever can be made against these banks, when such collections are no longer justified as having any rational relation to any public purpose. If the assessments admittedly defeat the object of the law, and no reciprocal benefits exist but injury to banking alone results, then the amount of the tax becomes immaterial, for no tax would then be justified and supported in its operation as tending towards the accomplishment of a public purpose.

DEPOSITORS IN FAILED BANKS HAVE NO CONTRACTUAL RIGHTS TO REQUIRE FURTHER ASSESSMENTS.

Appellees devote a large portion of their brief to the proposition that the obligation of the banks to pay these assessments is contractual, that the claimant depositors, with some $26,000,000.00 of claims, when they made their deposits impliedly entered into contracts with all of the state banks in the state, and, by virtue of the Bank Guaranty Law, all of the banks contracted they would see that these deposits were paid and that they would continue assessments indefinitely for that purpose.

The appellees and the interveners do not agree as to the extent or consequence of such a claimed contractual relation.

The appellees admit that even though the relation is contractual, and even though there were vested rights in these depositors, still the legislature may repeal the law and change and impair the obligation and terminate the agreements and vested rights at will, but they say the courts cannot, by declaring the law unconstitutional, reach the same end. Appellees in their brief say (p. 144):

> "These depositors have a vested contract right under the law against the banks of the state bank system. This contract is a valuable property right which cannot be taken or divested by judicial decree."

And yet, at the same time, the appellees say the legislature may divest these parties of their rights (brief,

p. 143), and cite the recent act of the Nebraska legislature modifying, limiting and changing the obligation of the banks with reference to assessments so as to provide a settlement fund and to pay a certain class of depositors a pro rata portion of their claims. Appellees insist that this law is valid, and yet this is inconsistent with the argument that the depositors had vested contractual rights, valuable property rights, protected by the Constitution.

Interveners, on the other hand, in an aim to be consistent, also claim that the rights of depositors are contractual, and that this is so regardless of whether the law has become unconstitutional in its operation; but they deny that these contractual rights can be impaired by any act of the legislature, and assert that the recent act of the Nebraska legislaure is itself unconstitutional as impairing vested rights of contract of the depositors whom they represent.

Interveners in their brief say (pp. 44, 45, 46):

> 'So appellees contend that the result of the present or future operation of the law (the Guaranty Law), in so far as it affects present or future depositors, should not be considered by the Court, nor should the Court in light of accrued rights of interveners, under all the facts shown in the evidence, consider the relation of the Act to present public welfare, as controlling. • • •
>
> The rights of interveners and depositors in failed banks which have accrued under the Act are paramount and superior to the right of the other parties to the prescribed contract to question the constitutionality of the Act. • • •

> * * * that interveners have accrued rights under this contract, although it may be decided by reason of present conditions that the Act has no substantial relation to the public welfare."

In other words, interveners claim, so far as their claimed rights are concerned, the question of whether the law now operates in such a way as to tend to carry out or support any public purpose, or whether the law in its present operative effect is unconstitutional, is immaterial, since they have contractual rights, arising while the law was in operation, and that these rights cannot be taken away.

They say it matters not what effect thees assessments have upon present banks; what the effect may be to the protection of present depositors; nor whether the operation of the law is justified for a public purpose. Their position is that though the assessments may be ruinous to the going banks, it is no concern of theirs, for they have claims for collection; that their claims are contractual and, regardless of public welfare, public interest, ability of the present banks to continue in business, they must be allowed to perpetuate this police regulation and collection of assessments and enforce the liability against the banks in spite of what the consequence may be.

The error of the appellees and of the interveners is no better exemplified than the admitted and diverse results to which their arguments lead them.

We submit that no one can have a vested right in the continuance of a police regulation, and we submit a

police regulation may govern transactions so long as it validly operates, but as soon as it becomes unconstitutional, its operation from that moment ceases.

In other words, these depositors entered into transactions by making their deposits, which transactions were then governed and controlled by a currently operating law. It was known to them at that time that the law could protect them and give them rights only so long as it continued; that it was a police regulation and subject to repeal by the legislature, and that if the law, in its operative effect, resulted in its becoming unconstitutional, that the regulation would then cease and could be so determined by decree of court.

Interveners in their brief (p. 73) say that the depositors "relied upon the supposed operation of the law." That is true, but they, together with all others concerned, were bound to take notice that the law might fail, be repealed, or, in its operation, become unconstitutional.

Appellees and interveners both rely upon the case of *Lankford v. Platte Iron Works Co.*, 235 U. S. 461, 59 L. ed. 316. That was a mandamus action, brought to compel the Oklahoma State Banking Board to recognize the claim of a depositor in a failed bank against the guaranty fund and, if the fund was insufficient, to compel assessments to meet the obligation.

The only question for determination in that case was whether the suit against the State Banking Board was a suit against the state; a question necessary to the de-

termination of jurisdiction. The Supreme Court held that the suit was against the state and not against the officers as individuals.

In the dissenting opinion filed reference is made to the character of the obligation in favor of the plaintiff depositor, but what the court has said in that dissenting opinion is no more than to say that the transaction and contract of the depositor in the bank, and the rights of the parties, were governed by the guaranty law, carried into the transaction by implication, since any contract made was with reference to that law, and the law, being then operative and unquestioned as to validity, was a part of the agreement by implication.

In that case the validity of the guaranty law was not questioned. It was at that time, in its beginning in 1914, in its operative effect, constitutional. That case is therefore entirely distinguishable from the case here. We do not question the proposition that a contract made with reference to the subject matter of a statute, so long as the statute is valid and consitutional, will by implication carry the provisions of the statute into it. But the provisions of the statute, so by implication carried into any agreement, do not survive the statute itself; they are not made an express provision so as to become of an independent contractual nature. The obligation is purely implied. Whenever the law becomes in its operation unconstitutional, the governing provisions of the statute cease. No one can get a vested right in the continuance of a police regulation. A complete answer to the argument that a contract is made which outlives the statute and continues, regardless of the statute, is the admission

on the part of the appellees that the obligation ceases when the statute is repealed, and so it must indubitably follow that the effectiveness of the implied provisions of the governing law also cease when the law is declared unconstitutional or when it becomes in fact unconstitutional.

In our case the assessments have not been paid. Their collection stands enjoined, and whether they must be paid depends upon whether the law was constitutional at the time of the commencement of this suit.

In 13 Corpus Juris, p. 561, it is said:

> "Where a provision of a statute is to be read into a contract, it falls with the statute when such statute is subsequently declared unconstitutional."

In the case of *City of Cleveland v. Clements Bros. Const. Co.*, 67 Oh. St. 197, 65 N. E. 885, a statute of the state of Ohio, required contractors with municipalities to insert in their contracts a provision limiting the hours of labor of their employees performing work under the contract. This law was held unconstitutional, as abridging the liberty of contract. A contractor with a municipality had expressly inserted in his contract the provisions required by the statute. It was argued that, having expressly inserted the provisions in his contract that the hours of labor would be limited, the contractor was estopped to set up the unconstitutionality of the law. It was urged that when the city:

> "invited bids for the performance of the work, 'The statute is one of the conditions which must be complied with, and an obligation which must be assumed by the contracting party.' The contracting party

(the Clements Bros. Construction Co.) was not compelled to bid. It did so voluntarily, with full knowledge, and, when awarded the contract, executed it voluntarily, knowing all of its provisions, and assumed the obligations and conditions imposed by the statute."

The court held that these provisions expressly inserted in the contract did not take upon themselves the character of contractual obligations, but were to be considered as a reference only to the law governing such matters, and that such provisions were valid only so long as the statute itself was valid. In the opinion the court said:

"If the law is valid, it governs the contract and the rights of the parties, whether actually incorporated into writing or not, since all contracts are assumed to be made with a view to existing laws on the subject. * * It is not in the power of the legislature to protect an invalid law from judicial scrutiny by providing that it must receive the assent of the parties to every contract to which it relates. * * * Courts in such cases are not bound by mere forms, but must look at the substance of things, and, so viewing this transaction, it would be idle to attempt to deceive ourselves with the idea that the question involved in this appeal arises out of the stipulations of the parties to the contract, or is governed by them, rather than the provisions of a statute. The contract is in the form that we find it not because the parties so elected to contract, but for the reason that the statute would not permit them to contract in any other way."

In a similar case, *People v. Coler*, 166 N. Y. 1, 59 N. E. 716, the court held:

"A stipulation in a contract that it should be void on failure to comply with the labor law, which requires contractors on public work to pay the prevailing rate of wages, falls with the statute when the

> latter is declared unconstitutional, and hence will not estop the contractor from recovering on the contract, though the provisions of the statute were not complied with."

See, also, the decision in *Morse v. Metropolitan S. S. Co.*, 88 N. J. Eq. 325, 102 Atl. 524, where the court said:

> "As the provision of Corporation Act 1896, Sec. 65, as amended by Act April 1, 1912, authorizing the appointment of a receiver, without notice, is unconstitutional, a corporation may assert the invalidity, though it was incorporated under the act; the presumption being that parties, whether natural or artificial, have entered into a contract with reference to the valid laws only."

Where a contract is made with reference to the subject matter of a statute, the provisions of the statute do not become express contractual obligations of the parties, independent of the statute, but exist only by reason of the implication that the statute is intended to govern, and the statute, in the contemplation of the parties, could be intended to govern only so long as the statute is valid or unrepealed. The moment the statute becomes unconstitutional, its governing provisions cease to operate. There is nothing in the implication of the inclusion of the provisions of a statute in a contract which causes those provisions, as contractual obligations, to outlive the statute itself.

The statute here placed an imposition upon the banks to pay assessments so long as the statute remained constitutional. When it is conceded that the statute becomes unconstitutional, then it must be that the operative force

of the statute terminates. Such is the nceessary contemplation of the parties when they make their agreement. If the rule were as the appellees and interveners contend, that the banks have by contractual obligation become liable to the payment of all depositors in failed banks, so as to be perpetually obligated to pay assessments until all such depositors were paid, then a police regulation once enacted, although becoming unconstitutional in its operation, is perpetual and one against which there is no remedy nor relief.

The depositors who are claimants in this case have had the benefit of all the current assessments during the operative period of the law. Some $16,000,000.00 have been paid by the banks towards the satisfaction of their claims. Current depositors in going banks are also entitled to protection. They are entitled to have reserves built up for them. They are entitled to have banking made safe for them.

Interveners argue that nevertheless assessments must continue, regardless of the rights of present depositors, regardless of the public welfare, regardless of the safety of banking, on the theory that there are contractual obligations which outlast the law.

Appellees, although they argue contractual obligation, admit that these may be dispensed with by legislative act. Their admission directly coincides with out contention, and that is that the governing effect of the law, so far as it by implication is carried into contracts, continues only so long as the law exists and only so long as it continues as a valid regulation.

That the obligation of the banks to depositors is not contractual, in the sense that it outlives the statute, or in the sense that it creates vested rights of contract which cannot be impaired nor changed nor repealed by the legislature, is borne out by the decisions cited in our original brief of *Wirtz v. Nestos*, 51 N. D. 603, 200 N. W. 524, and *Standard Oil Co. v. Engel*, 55 N. D. 163, 212 N. W. 822, and these decisions are in no way, as we view them, inconsistent with anything that has been said in the case of *Lankford v. Platte Iron Works Co.*, 235 U. S. 461.

In *Wirtz v. Nestos*, 200 N. W. 524 (N.D.), an action was brought by depositors in certain banks, in behalf of themselves and all other depositors similarly situated, to compel the guaranty fund commission to allow their claims and pay their deposits in full. There was in the fund at that time $400,000.00, and the claims allowed against the fund amounted to $200,000.00. But this $200,000.00 was sufficient to pay only about 20 per cent of the total depositors in failed banks.

The legislature amended and changed the law so as to provide that the fund should be paid pro rata to depositors in all failed banks instead of, as provided in the original statute, to those depositors in the order of priority according to the time when their bank had failed.

The depositors who brought the suit claimed that this interfered with their vested rights in the fund, and that the statute changing those rights was unconstitutional as impairing a contractual obligation.

The court in the opinion said:

"Whether the law be passed in the express interest of a designated portion of the general public,

> or of the public as a whole, the act must be classed as a regulatory measure and find its justification in the police power.
>
> * * * but the broad basis upon which the exercise of the power rests is the safety and welfare of the state and of its citizens as a whole, rather than the interest of the individuals who make deposits in banks."

The court said that the rights of the depositors against the fund did not:

> "rest upon contract in any respect, and the legislative wisdom which dictated the adoption of that policy may likewise alter or abandon it."

And that:

> "The state undertakes to perform a service to depositors not in any manner founded on contract."

The court further said:

> "We think that the general statement of the rule in 2 Story, Const. (5th Ed.) 674, applies to the situation in the record:
>
> 'A party has no vested right in a rule of law which would give him an inequitable advantage over another; and such rule may, therefore, be repealed and the advantage thereby taken away."

The court in that opinion held that the depositors had no claim of a contractual nature and that the legislation changing their right from a priority right to one requiring them to share pro rata with all other depositors in the state was a proper and valid regulation.

The court in that opinion questioned the right of the legislature to impose burdens upon open banks that would

lead to general insolvency and collapse of the state banking system, but the facts showing such a condition *were not presented in the case*. The court said:

> "The situation, contrary to that which was before the Legislature in 1917, clearly disclosed that it would be possible to pay immediately or within a reasonable time, from assessments levied against the remaining banks, only a comparatively small number of the depositors in the banks then closed, without imposing burdens on open banks that would lead to general insolvency and collapse of the state banking system. Whether the power exists to impose such a burden, we need not decide."

In the case of *Standard Oil Company v. Engel, et al.*, 212 N. W. 822 (N. D.), the Standard Oil Company, which had moneys in certain banks and which banks had failed, brought an action against the guaranty fund commission to compel the commission to recognize its deposits as being covered by the guaranty fund. It proved that its deposits had been included in the reports of the banks and that the assessments had been based upon the deposits which it had, and it claimed that the guaranty fund commission, in refusing to recognize the deposits as valid claims, acted fraudulently and capriciously, and claimed that its rights in the guaranty fund were vested and contractual and that it was deprived of these property rights without due process of law.

The court pointed out, however, that it had no vested rights and:

> "that the rights of depositors as claimants against the fund *are not contractual*."

As a further argument the plaintiffs claimed that as depositors in the bank they had helped accumulate the fund and therefore had, for that reason, vested interests in it. The court answered that argument in the negative, as follows:

> "In this connection the plaintiff insists, on the one hand, that the depositors have built up the guaranty fund by contributions of their own property, and so it belongs of right to them. This, however, is not the case. The fund was created and is maintained by the state in the exercise of the police power through exactions from the banks analagous to special assessments. It may be true that the theory is that the banks will be benefited and recompensed through greater deposits on account of greater safety to the depositors, but, even so, the exactions going to make up the fund are paid by the banks and not by the depositors. While the act provides that the guaranty fund commission shall fix the rate of interest (not in any case exceeding 6 per cent) that may be paid upon deposits, this, likewise, is done in the exercise of the police power and will not sustain plaintiff's contention that it results in placing the burden of the exactions upon the depositors."

As we have said above, these decisions are not in conflict with *Lankford v. Platte Iron Works Co.*, but emphasize what clearly seems to us to be the rule that the Guaranty Fund Law is only a police regulation governing the relations of depositors and banks so long as it continues as a valid law, but that independent and contractual rights, except those running with the existing statute, cannot be created which would outlast the law itself, and that the police regulation is at all times not only subject to modification by the legislature but, when in its operation it becomes unconstitutional, is subject to being

held so by the courts, and that from the time it becomes unconstitutional it no longer, by implication, can govern the existing rights of the parties involved in any past transaction under it, but ceases from that moment in its further operation, and all rights which would otherwise currently accrue under it are from that time gone and extinguished.

—o—

EVERY STATE BANK IS SO INVOLVED AND INTERESTED AS TO HAVE THE RIGHT TO RAISE THE QUESTION OF UNCONSTITUTIONALITY.

The appellees, on page 198 of their brief, urge that no party is entitled to equitable relief against the enforcement of a law by showing that it works a hardship on others, and they say that some of the banks have been able to profitably operate and yet pay these assessments, and that they have no right to point out that the law is oppressive and confiscatory as to others.

The cases which they cite are statutes regulating independent corporations, having no enforced partnership between them. It is apparent that quite a different rule obtains under those circumstances. A corporation, acting independently of others, which makes a profit and is not oppressed, and to whom a tax is not confiscatory, cannot urge that the tax is confiscatory as to others, for as to those others it is not concerned. It has no interest in them. It is not hurt.

But here we have, to the extent of the Guaranty Fund law, an enforced partnership between all of the

state banks in the state. Where a bank fails, losses are magnified. Its good will is destroyed. As has been testified in this case, the closing of a solvent bank sufficiently depreciates the value of its assets to wipe out its entire capital. Each bank in the system, therefore, is concerned in the life and success of every other bank. It is concerned in seeing that other banks are not oppressed, that their properties are not confiscated, that they are allowed to live and continue in business, for their failure and consequent losses creates an immediate burden upon the successful bank. Each bank therefore in the state, whether it can operate profitably or not, is interested in the success of every other bank, and therefore has the right to show the operative effort of the law upon the entire state banking system, for the losses of the failing banks must be paid by the others.

If the law, then, is injurious to a great majority of the banks, as we contend, if it prevents them from accumulating reserves for their own depositors, if it hampers them in their banking business, if it destroys confidence in the people because of the immense obligation against them, if it is necessary that they make up the deficit in the Guaranty Fund, it certainly must follow that any bank in the system has the right to raise the question and test the constitutionality of the law.

But this case is brought by the Abie State Bank in behalf of all of the banks in the state, a great majority of whom, even under appellees' own rule, if applicable to the case, have a right to raise the question.

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IN CONCLUSION

It is claimed that this suit is controlled by Shallenberger vs. The State Bank of Holstein as res judicata. If the parties to this litigation were the same as the parties in Shallenberger vs. Holstein, and they are not, the judgment of this court in that case is not res judicata for none of the questions herein were presented to the court in that case or could have been presented. This court held in that case that the state had the right to try out the Guaranty Fund tax as a police regulation and to that end an inconsiderable part of a bank's property might be taken to create a Guaranty Fund to strengthen banks and protect their depositors and to stabilize banking. This case is now presented under changed conditions and with known results. The emergency tax as confiscatory was not before this court in the Shallenberger case and could not have been as it was not certain that any emergency tax would ever be levied. A deficit in the Guaranty Fund of over $15,000,000.00 was not before the court in that case and could not have been. The taxes to be levied in the future under the Shallenberger case were to go towards the creation of a Guaranty Fund to protect depositors in banks. In the present case the taxes sought to be enforced do not go into a Guaranty Fund at all to protect depositors in banks but are to go solely to pay depositors in banks that have failed. Instead of an insignificant taking of part of a bank's property for an ulterior public purpose, which was the basis of the decision in the Shallenberger case, today the state is demanding enormous sums not for a public purpose or to protect depositors in banks but for the private purpose to pay the losses of failed banks. There is no longer any

public purpose to be served by these enforced contributions from the banks, but on the contrary the end sought to be accomplished is a private one. No reasonable ground today can be urged why this tax should be continued. It is simply an attempt upon the part of the state to force enormous contributions from the banks to pay the losses of failed banks and hence is in direct violation of the Fourteenth Amendment. While of course everyone sympathizes with depositors who have lost their money through misplaced confidence in banks, the present banks are in no way to blame for their condition. To continue the tax would add very little to the relief of those who have already lost in part their deposits and would add thousands to their number through the wrecking of probably two-thirds of the present banks.

Respectfully submitted,

FRANK H. GAINES,

LEONARD A. FLANSBURG,

S. S. SIDNER,

Attorneys for Appellants.

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Number [redacted] 63

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In the
Supreme Court of the United States

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OCTOBER TERM, 1929.

—o—

ABIE STATE BANK, ABIE, NEBRASKA,
Appellant,

vs.

ARTHUR J. WEAVER, as Governor of the State of Nebraska, and CLARENCE G. BLISS, as Secretary of the Department of Trade and Commerce,
Appellees.

WILLIS M. STEBBINS, as Treasurer of the State of Nebraska,
Appellee.

MARY E. GANDY, et al., FRANK PALMER, et al., EDWARD LINCOLN, et al.,
Appellees.

—o—

ON APPEAL FROM THE SUPREME COURT OF NEBRASKA.

—o—

Statement of matters against jurisdiction in compliance with Rule Twelve of this court, by Arthur J. Weaver, as governor of the state of Nebraska, and Clarence G. Bliss, as secretary of the Department of Trade and Commerce.

—o—

C. A. SORENSEN, *Attorney-General of Nebraska,*

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Attorneys for Arthur J. Weaver, as Governor of the State of Nebraska, and Clarence G. Bliss, as Secretary of the Department of Trade and Commerce.

COCKLE PRINTING CO., LAW BRIEFS, OMAHA

Number 750.

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MAY IT PLEASE THE HONORABLE COURT:

Appellees appeal from a decision rendered by the Supreme Court of the State of Nebraska. In appellees' statement to sustain the jurisdiction of the Supreme Court

of the United States, they quote and refer freely to the opinion and decision rendered in their favor by the District Court of Lancaster County, Nebraska and which was reversed on appeal by the Supreme Court of Nebraska. On appeal of an equity suit to the State Supreme Court in Nebraska, the case is tried *de novo*.

Sec. 9150, Compiled Statutes of Nebraska, 1922, provides:

> "Sec. 9150. *Review On Appeal in Equity.*—In all appeals from the district court to the supreme court in suits in equity, wherein review of some or all of the findings of fact of the district court is asked by the appellant, it shall be the duty of the supreme court to retry the issue or issues of fact involved in the finding or findings of fact complained of upon the evidence preserved in the bill of exceptions, and upon trial de novo of such question or questions of fact, reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the district court or the fact that there may be some evidence in support thereof."

We shall therefore make no further reference to the opinion and decision of the District Court, as they could have no bearing in this Court. We shall confine ourselves to the record in the Nebraska Supreme Court where the case was tried de novo.

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THE ISSUES TRIED AND DETERMINED IN THE SUPREME COURT OF NEBRASKA.

The plaintiff's petition was substantially as stated by it: excepting that it specifically assailed a special as

sessment for the Depositors Guaranty Fund levied in December, 1928, to apply on previously adjudicated claims of depositors against that Fund. (R., Vol. 1, pp. 3-9).

The answers of defendants and intervening defendants are omitted from appellant's statement and are important in view of the decision of the Supreme Court of Nebraska, upholding their contentions, including the issue of estoppel.

The answer of Arthur J. Weaver, was made as Governor of the State of Nebraska, and also made and filed for and on behalf of the public officials of the State of Nebraska and municipal and other public corporations of the State, depositors in failed banks and with adjudicated claims against the Depositors Guaranty Fund. Clarence G. Bliss answered as Secretary of Department of Trade and Commerce.

The answers of defendants denied generally all the material facts alleged by plaintiff; plead the adjudication in 1909 by the Supreme Court of the United States of the validity of the Nebraska Guaranty Fund law, in *Shallenberger v. First State Bank of Holsten,* 219 U. S. 114, 31 Sup. Ct. Rep. 189, 55 L. Ed. 217, and the reliance on and acting on such adjudication by both banks and depositors for eighteen years and that the same was *res adjudicata;* and plead extensive acts and representations by all the Banks inducing the deposits resulting in the claims that the special assessments were being levied to pay and constituting estoppel (Answer, R. Vol. 1, P. 29).

Petitions in intervention (and cross-petitions), joining with defendants, were filed by Willis M. Stebbins as Treasurer of the State of Nebraska, and also by other depositors with adjudicated claims against the Depositors Guaranty Fund, on behalf of themselves and others similarly situated.

The Nebraska Supreme Court upon trial *de novo* found for defendants and interveners on the facts and on the authority of *Shallenberger v. Holsten*, held the law constitutional; and on the plea of estoppel and the facts in support thereof held the banks were estopped to assert the invalidity of the law. (Opinion and decision, R., Vol. 1, P. 77). Three large volumes of testimony support these holdings and disclose that the affirmative contentions of the banks were not supported. (Record of Evidence, Vols. 2, 3, and 4.)

The definite decision by the Nebraska Supreme Court of each proposition will be hereinafter quoted.

While the opinion and decision of the Supreme Court of Nebraska disclose that it was a joint judgment for defendants and interveners, the appellant has failed to perfect an appeal as to interveners, and appellant's transcript of the pleadings (R., V. 1) omits the pleadings of the interveners.

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GROUNDS AGAINST JURISDICTION.

We submit as grounds against the jurisdiction of the Supreme Court of the United States in this case:

First. That this court has heretofore conclusively adjudicated the validity of the Nebraska law against appellant in the suit brought on its behalf, and the entire question is res adjudicata.

> *Shallenberger vs. First State Bank of Holsten,* 219 U. S. 114, 31 Sup. Ct. Rep. 189, 55 L. Ed. 217.

The Holsten Bank brought its action in that case as a representative of and on behalf of all the other Nebraska State Banks.

A judgment on questions in which a governmental agency or district, or the officers representing it, are involved, is binding and conclusive on all citizens, residents or other parties affected thereby.

> *McIntosh vs. Pittsburg,* 112 Fed. 705.

Where one bank as a representative of and on behalf of a group of banks litigates a matter in which the banks all had an identity of interests, the judgment in such case is binding and conclusive upon each member of such group.

> *Hart Steel Co. vs. Railroad Supply Co.,* 244 U. S. 294, 37 Sup. Ct. 506.
>
> *Washington Steam Packet Co. vs. Sickles,* 24 How. 333, 16 L. ed. 650.

Second. That by the decisions of this Court (quoting)

> "It is axiomatic that, in order to give this Court jurisdiction on writ of error to the highest court of a state in which a decision could be had, it must appear

affirmatively, not only that a federal question was presented for decision by the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it. And where the decision complained of rests on independent ground, not involving a federal question, and broad enough to maintain the judgment, the writ of error will be dismissed by this court without considering any federal question that may also have been presented."

Powder Works vs. Davis, 151 U. S. 389, 393, 14 Sup. Ct. 350.

Missouri Pac. Ry. Co. vs. Fitzgerald, 160 U. S. 556, 16 Sup. Ct. Rep. 389.

Eustis v. Bolles, 150 U. S. 361, 14 Sup. Ct. 131, and cases cited.

—o—

THE PRIOR ADJUDICATION BY THIS COURT.

The Nebraska Bank Guaranty Fund Law was passed in 1909. It contained and has since contained the following provisions among others (Compiled Statutes of Nebraska, 1922):

Sec. 7983. The business of banking * * * is hereby declared to be a quasi-public business and subject to regulation and control by the State.

Sec. 8024. For the purpose of providing a Guaranty Fund for the protection of depositors in banks, every corporation engaged in the business of banking under the laws of this State, shall be subject to assessment to be levied, kept, collected and applied as hereinafter provided.

Sec. 8026. Provides for a regular assessment of one-twentieth of one per cent semi-annually on the average daily deposits; and Sec. 8028 provided for special assessments of one per cent on the average daily deposits; in 1923, long after the decisions to be quoted, this special assessment was reduced by the Legislature to one-half of one per cent, where it has since remained. (Laws Nebraska, 1923)

After the passage of the law an action was promptly brought by the First State Bank of Holsten and other Banks as plaintiffs, on their own behalf and on behalf of the other Nebraska State Banks, including Abie State Bank, against A. C. Shallenberger, as governor, to enjoin the enforcement of the law. The lower federal court on demurrer granted an injunction (172 Fed. 999). The case was then appealed to the United States Supreme Court and by this court reversed and the law sustained *Shallenberger v. First State Bank of Holsten,* 219 U. S. 114, 31 S. Ct. Rep. 189; 55 L. Ed. 217). The memorandum opinion of the United States Supreme Court stated that the case was governed by the decision in a similar case from Oklahoma entitled *Noble State Bank v. C. N. Haskel, as Governor, et al.,* 219 U. S. 104, 55 L. Ed. 112.

The petition filed in the Shallenberger v. Bank of Holsten case raised, directly or in principle, every material question that has been raised in this Abie State Bank case. Inasmuch as the State Bank of Holsten case was determined on demurrer all questions well-pleaded stood admitted and by the decision were determined against the banks. The petition therefore is important and a copy thereof is attached to the Record herein as Exhibit 49 at Page 724, V. 4. Some of the plaintiff banks in that

case were private banks. The banks pleaded vested property rights, that their charters were binding contracts and not subject to change, that under the new banking act it was made unlawful to be in the banking business after the effective date of said banking act except by compliance with its terms and receipt of a charter and certificate thereunder, involving the payment of Guaranty Fund assessments, regulation, etc.; they alleged that their property was taken without due process of law, because their banking buildings and fixtures acquired under the prior existing law would be rendered less valuable or confiscated; that by the terms of said act the Guaranty Fund assessed against the capital stock of each of said banks became a general fund appropriated for the payment of depositors in failed and insolvent banks, thereby making solvent banks contribute out of their assets sums of money to be used, not for the payment of their own liabilities but for the payment of the liabilities of other banks; that the total deposits in the state banks amounted to $76,644,015, and that the special assessment provided for would amount to the sum of $766,440.15 annually, and that the said special assessment was unreasonable and confiscatory; that the purpose and scope of the said act was to extend the credit of the state of Nebraska to individual banks; that to require private bankers to transfer their business to a corporation or in lieu thereof to discontinue their business or to have their affairs wound up by a receiver would result in loss and damage to each and singular of said banks and deprive them of their property, all in violation of state and federal constitutions.

The Abie State Bank was then doing a banking business (R., Vol. 2, p. 147), and the suit was on its behalf. A comparison of the assignments of errors and arguments now urged as to the invalidity of the law as a ground of jurisdiction indicates that they are exactly the same as were adjudicated in the Holsten Case.

The one exception now sought to be made is the statement that the unpaid claims against the Guaranty Fund now aggregate $15,000,000. This affects the claimants but not the banks. It merely postpones the time of payment of the claimant depositors. The amount of assessments to be paid annually by the banks is not increased or affected by it. The maximum liability of any bank is the payment of one-tenth of one per cent regular assessment and five-tenths of one per cent special assessment annually on its deposits; aggregating $600 per $100,000 of deposits. This amounts to about nine cents out of each dollar of gross income. Salaries and wages consume three times as much. (Rec. Vol. 4, p. 710, Ex. 39).

The comparison by appellant of the gross liabilities of the fund with capital of banks is misleading. One has no relation to the other. Nor do the banks pay eight per cent on their capital to the Guaranty Fund, as appellant states; nor any other per cent. Increased earnings by reason of the benefits of the Guaranty Fund furnish the income to pay its assessments. Exemption from giving bonds for public deposits is but one of these benefits; the average surety company rate on bonds is seven-tenths of one per cent (R., pp. 716-8, Vol. 4). Higher than the Guaranty Fund rate. The action of the Legislature of

1923 in cutting the assessments practically in two necessarily caused the accumulating of unpaid claims.

So in principle, the situation is as it was at the time the Court adjudicated the law as Constitutional.

A number of contentions of fact in appellant's statement of Grounds of Jurisdiction are entirely unfounded. For example, on page 7, it is stated that the Supreme Court of Nebraska in its opinion recognized the "confiscatory character of the tax." The decision of that court was exactly to the contrary as shown by an excerpt from the opinion on that precise point.

> "In respect of the many failures of banks about this time, the cashier of a Lincoln state bank testified that, in his opinion, the failure of nearly 300 Nebraska state banks was caused largely by the general economic condition existing prior to 1928; that he did not think the bank assessments from 1923 to July 1, 1928, were a contributing factor in the failure of banks during that period, and that, in his opinion, the guaranty fund law and the assessments collected thereunder had a steadying influence on the deposits of every state bank. Continuing, he testified that "it is no exaggeration to say it has accounted for at least one hundred million dollars deposited in the state banks of Nebraska which would not otherwise have been made except for the bank guaranty law." In his opinion, the conditions of the banks and their ability to pay the assessment is "incomparably better than in 1923."

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ESTOPPEL.

The answer pleaded in detail, numerous, extensive and continuous representations and acts by each and all of the banks constituting estoppel, waiver and laches; the latter two in a sense being embraced in the former term.

It was this question of estoppel, among others, that the Supreme Court of the State tried *de novo*. Approximately two-thirds of the opinion incorporating the decision is devoted to that question. The determination in the "third" paragraph of the syllabus on the issue of estoppel is for defendants and is general; the body of the opinion necessarily could not cover in detail all the acts constituting estoppel which were incorporated in the three volumes of testimony supporting the answer.

It was with reference to this defense made by the answer and this evidence that the Supreme Court made its general findings and decision and we shall necessarily briefly refer to the answer of the defendants and thereafter quote the opinion and decision of the Supreme Court on that issue.

Defendant answered (R., Vol. 1, P. 29):

That the plaintiff and other banks had each continuously advertised and used the Guaranty Fund Law, since its enactment, throughout the State of Nebraska and in their respective communities by newspaper advertisements, printed recitals on the stationery of the respective banks, personal solicitation and argument, circulation of the public, and signs on the interior and exterior of the banks generally, and had thereby and otherwise individually and collectively represented to the depositing public that all deposits in the state banks were protected by the Depositors Guaranty Fund; that its validity had been adjudicated by the Supreme Court of the United States in the case of *Shallenberger v. First State Bank of Holstein;* that each and all of said banks

were subject to assessment and would be assessed for any sum becoming due any depositor of any of said banks that might fail; and that each bank in the state system would pay any assessments necessary to pay depositors in failed banks; that the banks constituted in effect a mutual insurance association; that each state bank in Nebraska has demanded and received public funds for more than fifteen years without giving bonds under the provision of said Guaranty Fund Act that any bank which complied with its provisions should not be required to give further security or bond for the purpose of becoming a depository for public funds; that in 1923 the plaintiff and other banks acting in cooperation with plaintiff caused the legislature of Nebraska to reduce the maximum special assessment from one per cent to one-half of one per cent; that said representations were made in order to induce deposits in state banks and that depositors, relying on said representations and acts, deposited large sums of public funds and private money in state banks.

Averred that there now existed adjudicated claims against the Guaranty Fund in the sum of several millions of dollars which were based on public and private deposits made in banks by reason of such representations and acts.

Defendants averred the application for and the licensing of all state banks under said law and their operation thereunder for approximately twenty years and their invoking and exercising the benefits and privileges thereof, and that the obligation to pay the Guaranty Fund assess-

ments had become and was a part of their articles of incorporation and charter.

Averred that the banks had permitted and induced persons to deposit their moneys in reliance on the acts and representations of the Banks and to thereby become claimants against said Guaranty Fund—and without denial of liability for assessments or of the validity of said law. And averred further acts of representation and inducement which we will not burden this statement with.

Defendants averred that by reason of all of said facts, the plaintiff and other banks were estopped to question the validity or constitutionality of the law; to question or deny the reasonableness of any assessment levied thereunder; to question or deny liability to pay the assessments levied under the law.

These defenses were established beyond controversy by the evidence as shown in the record and the Nebraska Supreme Court specifically found in the syllabus and opinion for the defendants on these issues.

There were $2,000,000 of public funds in failed banks (Ex. 36, p. 590, Vol. 3, Record).

The Decision of the Nebraska Supreme Court on Estoppel.

The opinion containing the decision of the Nebraska Supreme Court is reported in 227 N. W. Rep. 922, and is a part of the record in this case brought to this court by appellants in perfecting their appeal (R., Vol. 1, p. 77). For the convenience of the court we will copy those parts pertaining to Estoppel.

The third paragraph of the syllabus (by the Court) is as follows:

> "Where a state bank has accepted the benefits arising from the deposits of money pursuant to the terms of the bank depositors guaranty law, such bank should not be heard, in a proper case, to make complaint of a special assessment upon such deposits which has been levied for the benefit of the depositors guaranty fund."

We quote from the body of the opinion and decision on this issue:

> "It appears from the evidence of the president of one of the largest Nebraska state banks, that he was active in the publication of 2,000 pamphlets which were distributed generally in respect of the establishment of the guaranty fund. * * *
>
> "In 1926, during the months of June, July, August, and September, twenty-six, full page newspaper advertisements, attractively featured with pictures and aptly prepared reading matter, appeared in one of Omaha's leading newspapers. These advertisements stressed the proposed protection that was shortly to be afforded the depositors of money in the state banks throughout Nebraska. And on one page of these advertisements, 336 banks are listed as having paid their pro rata share of the cost of the publication. The largest state bank, located in Omaha, paid between $500 and $600 as its share of the expense of this newspaper publicity. The enterprise was given wide circulation in practically every town and its suburbs where a state bank was located, by illustrated newspapers with reading matter that was calculated to attract favorable attention and the patronage as well, of those having money for bank deposit. Following are some of the headings of the illustrated pages:

"A Story no other State Can Tell"; "No Mattress Banks in Nebraska;" "Strong Banks make Strong States;" "In the Hands of Skilled Bankers;" "State Banks protect their deposits in Nebraska;" "Nebraska is a Remarkable State;" "Pushing your money Through the Window;" "In Nebraska the Guarantee Works both Ways;" "All Work together in Nebraska;" "Safe through the Slump of Deflation Days." "The Men Who told the Story that no other State Can Tell" concludes the series of illustrated pages, and is followed by an enumerated list of the 336 state banks that sponsored the depositors guaranty fund enterprise.

These twenty-six advertisements appear at Pages 240, et seq., V. 2, Record, and the fourth of the series (Page 243, V. 2) has on the upper half of the page, a picture of the United States Supreme Court in session, and below an advertisement as to the constitutional adjudication headed "The Opinion of the Highest Court."

We quote the Nebraska Supreme Court further:

"From the evidence it clearly appears that a majority of the state bankers throughout Nebraska, and many others as well, counted the bank depositors guaranty fund, in its inception, a valuable asset, and many predicted that this beneficent plan would add greatly to the stability of the state banks. To illustrate this feature of the guaranty fund law, a brief excerpt from an advertisement which appeared in January, 1928, in one of the Nebraska papers having a large circulation may be noted:

"First, there are a few state bankers here and there who have good banks and who think they are greatly imposed upon by being compelled to pay an assessment to the Guarantee Fund. This is a natural feeling as they are in no way responsible for

the banks that fail. * * * The guarantee fund, so-called, is merely an insurance company whereby the state banks of Nebraska are the members and must pay through an assessment each other's losses up to the maximum amount of six-tenths of one per cent a year. * * * Any good bank, making a fair profit, can pay this assessment without injury to itself and can do so to the great benefit of the state."

"In respect of the many failures of banks about this time, the cashier of a Lincoln state bank testified that, in his opinion, the failure of nearly 300 Nebraska state banks was caused largely by the general economic condition existing prior to 1928; that he did not think the bank assessments from 1923 to July 1, 1928, were a contributing factor in the failure of banks during that period, and that, in his opinion, the guaranty fund law and the assessments collected thereunder had a steadying influence on the deposits of every state bank. Continuing, he testified that "it is no exaggeration to say that it has accounted for at least one hundred million dollars deposited in the state banks of Nebraska which would not otherwise have been made except for the bank guaranty law." In his opinion, the conditions of the banks and their ability to pay the assessment is "incomparably better than in 1923."

"First State Bank v. Smith, (S. Dak.), 207 N. W. 467, is cited by defendants and is in point. The court there observed that the banks had for many years accepted the benefits of the guaranty fund law and in consequence were not then in position to resist the just claims of depositors. The court also observed that the personal rights of the individual must always yield to the "rightful exercise of the police power."

It may here be noted that the maximum amount of the guaranty fund special assessment was reduced by the legislature in 1923 from one per cent, to one-half of one per cent, but subsequently the depart-

ment of trade and commerce, pursuant thereto, levied the special assessment of one-fourth of one per cent, within the maximum amount now fixed by the legislature, and of which complaint is now made by the plaintiff bank on its own behalf and in behalf of 556 other state banks, as above noted.

"The paramount object, and clearly the legislative intention in the creation of the depositors bank guaranty fund law was first for the protection of the depositors' money in the state banks. And from the fact that, under normal banking conditions, such act would likewise benefit the state banks such banks were, at least, not unfriendly to the enactment of the law in question. But it goes without saying that there never was, nor could be, any compulsion upon the state banks to accept deposits of money on the bank guaranty basis. But money was accepted by the state banks, pursuant to the terms of the depositors guaranty fund law, and by that law such banks are clearly bound.

"The demands on the guaranty fund are burdensome but the situation before us was created, or in any event was made possible, by the legislature in the enactment of the law. It is a basic principle that it is, ordinarily, not within the province of the courts to annul a legislative act except as a last resort and in a case where no other remedy is at hand. In view of the benefits arising from the deposits of large sums of money in state banks, pursuant to the terms of the bank depositors guaranty fund, should the banks now be heard to make complaint of the special assessment of one-fourth of one per cent upon their deposits? Have the observations of Judge Holmes in the Noble State Bank case, above cited, ever been answered? If so, our attention has not been directed thereto.

The Nebraska Supreme Court in the above opinion and decision refers to *First State Bank v. Smith* (S. Dak.)

207 N. W. 467 as in point. In that case claims against the fund had accumulated in large amounts while the banks were enjoying the benefits of the law and they sought to escape assessments to pay the accrued claims and the Court said (syllabus):

> "Such banks for ten years, accepted the benefits of the depositors' guaranty fund, which gave to them the right to hold, on deposit, public moneys without additional bond or security, to enjoy the confidence of the public by reason of the existence of such guaranty fund and all other benefits, real or supposed, emanating therefrom, and they are not now in a position to claim they have not consented thereto."

Appellants copy into their statement (Page 6) the entry from the Journal of the Supreme Court of Nebraska and maintain that it constitutes the basis of the decision of that Court. This entry on the journal constitutes nothing more than a notation of the directions for the disposal of the case.

Under the statutes of Nebraska, quoted supra, an equity case comes on appeal to the Nebraska Supreme Court for trial de novo. And that Court by Sec. 9150 C. S. Neb. 1922 is required to "*reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence.*"

The Supreme Court of Nebraska did this and found against the banks on the grounds of estoppel. The syllabus and opinion of that court both contain this specific finding of fact, and a decision thereon, and that syllabus and opinion are a part of the record brought to the Supreme Court of the United States by appellants. More-

over appellants assign as error the holding of estoppel against them as contained therein. (Assignment No. 3).

The decision of the State Supreme Court with the grounds and reasons for the decision as given in the syllabus and opinion of the court are the basis upon which the Supreme Court of the United States has always decided the question of the grounds of jurisdiction.

> *Thompson vs. Maxwell Land Grant Railway Co.*, 168 U. S. 451, 42 L. Ed. 539.
>
> "Whenever a case comes from the highest court of a State for review, and by statute or settled practice in that State, the opinion of the court is a part of the record, we are authorized to examine the grounds of such opinion for the purpose of ascertaining the grounds of the judgment."
>
> *Burbank vs. Ernst*, 34 Sup. Ct. 299, 232 U. S. 162, 58 L. Ed. 551.
>
> *Cuyohoga River Power Co. vs. Northern Realty Co.*, 37 S. Ct. 643, 244 U. S. 300.
>
> *Gross vs. United States Mortgage Co.*, 108 U. S. 477, 27 L. Ed. 795.
>
> *Dibble vs. Billingham Bay Land Co.*, 163 U. S. 63, 41 L. Ed. 72.
>
> *Egan vs. Hart*, 165 U. S. 188, 41 L. Ed. 680.

The Supreme Court of Nebraska is required by Sections 1074 and 1075 C. S. Neb., 1922, to cause all of its opinions to be reported and published, and they are therein referred to as the decision. This has always been the practice in that court and in this case as in all others coming to this court on appeal, the opinion as incorporating the decision was included as a part of the record.

The case of *Enterprise Irrigation District, et al., vs. Farmers Mutual Canal Co.*, 243 U. S. 157, 37 Sup. Ct. Rep. 318, (an appeal from the Nebraska Supreme Court,) is squarely in point on this issue. In that case the Supreme Court of the United States held that it would not take jurisdiction where the decision of the State Court had been on the basis of estoppel in pais involving a non-federal question although an independent federal question was also involved. In that case the Supreme Court of the United States, in its opinion, discussed and considered the several separate grounds of the decision as set forth in the syllabus and opinion of the Nebraska Supreme Court. And in denying jurisdiction it was said:

> "A decision of the highest court of a state adverse to the contention that, consistently with the due process of law and equal protection of the laws clauses of U. S. Const. 14th Amend., an adjudication of the state board of irrigation in favor of the asserted right of a canal company, under an alleged priority of appropriation, to divert through its canal a certain amount of water from a stream, could not be treated as binding upon those claiming under other appropriations, because it was made without lawful notice or opportunity to be heard, is not reviewable in the Federal Supreme Court on writ of error, where the state court also decided that the canal company was entitled to prevail for the reason that its adversaries were estopped by their own conduct to question the canal company's claims."

> "The contention that the highest court of a state, in disposing of some of the questions involved in a clause (case) including that of a defense of an estoppel in pais, misconceived or misapplied the statute and common law of the state, and thereby infringed the due process of law and equal protection of the laws clauses of U. S. Const. 14th Amend.,—presents

no Federal question which will sustain a writ of error from the Federal Supreme Court."

In *Arkansas, Southern R. Co. v. German National Bank*, 207 U. S. 270, 28 S. Ct. Rep. 78, 52 L. Ed. 201, the Court said:

"Ordinarily this court will not inquire whether the decision upon the matter not subject to its revision was right or wrong."

On page 3 of Appellants' Statement it refers to the proportion of banks that paid dividends during the two years preceding the commencement of this suit. This statement, apparently, is not pertinent to this jurisdictional question. Answering it, will say it was disclosed by an exhibit compiled from the records of the Banking Department that for the eighteen months period preceding the filing of this suit, those banks organized prior to 1909 had net earnings on their capital at the average rate for all of 15.66% per annum, and those organized after 1909 at the average rate of 14.29% per annum, after paying Guaranty Fund assessments, and before charging off bad debts sustained. These losses were largely on loans originating in the inflation period; they were very large with about one-fourth of the banks, and reduced the annual net average earnings of all the banks after charge-off of bad debts to 7.12% on their capital. More than three-fourths of the banks had net earnings available for dividends. The other one-fourth had the heavier losses. (Exhibit 38, Page 610, Vol. 3, Record.) It was bad debts, not Guaranty Fund assessments that reduced net earnings.

The present three million dollars of accrued assessments referred to by appellants is occasioned by the refusal of the banks to pay the several assessments levied since July, 1928.

In the case of *Shallenberger v. State Bank of Holstein*, the annual special assessment complained of was stated to be $766,644 on $76,644,015 of deposits, or 1% (see petition quoted herein); the law was held constitutional. The special rate of assessment has since been reduced one-half. At the time of the trial of this Abie Bank case the deposits of state banks was $252,000,000. (Ex. 38, p. 610, V. 3).

We respectfully submit that this court should not take jurisdiction of this cause on appeal.

Respectfully submitted,

ARTHUR J. WEAVER, as Governor of the State of Nebraska,

CLARENCE G. BLISS, as Secretary of the Department of Trade and Commerce,

Appellees.

C. A. SORENSEN,
Attorney-General of Nebraska.

CHARLES E. ABBOTT,
Special Counsel.

FILE COPY

AUG 11 1930

No. 34291

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1930

No. 63

ABIE STATE BANK, APPELLANT,

vs.

ARTHUR J. WEAVER AS GOVERNOR OF THE STATE OF NEBRASKA; CLARENCE G. BLISS AS SECRETARY OF THE DEPARTMENT OF TRADE AND COMMERCE, APPELLEES;

WILLIS M. STEBBINS AS TREASURER OF THE STATE OF NEBRASKA, APPELLEE;

MARY E. GANDY, JAMES H. COVEY, THEODORE H. BUELT, HUFFMAN & SEYMOUR, INC. (A CORPORATION), LEONARD N. SEYMOUR, JOHN HALBUR AND FRANK H. HEBENSTREIT, APPELLEES.

SUGGESTION OF A DIMINUTION OF THE RECORD AND MOTION FOR A WRIT OF CERTIORARI BY WILLIS M. STEBBINS AS TREASURER OF THE STATE OF NEBRASKA

JAY C. RODGERS, Law Brief Printer, 130 North Fourteenth St., Lincoln, Nebr.

No. 34881

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1930

No. 63

ABIE STATE BANK, APPELLANT,

VS.

ARTHUR J. WEAVER AS GOVERNOR OF THE STATE OF NEBRASKA; CLARENCE G. BLISS AS SECRETARY OF THE DEPARTMENT OF TRADE AND COMMERCE, APPELLEES;

WILLIS M. STEBBINS AS TREASURER OF THE STATE OF NEBRASKA, APPELLEE;

MARY E. GANDY, JAMES H. COVEY, THEODORE H. BUELT, HUFFMAN & SEYMOUR, INC. (A CORPORATION), LEONARD N. SEYMOUR, JOHN HALBUR AND FRANK H. HEBENSTREIT, APPELLEES.

SUGGESTION OF A DIMINUTION OF THE RECORD AND MOTION FOR A WRIT OF CERTIORARI BY WILLIS M. STEBBINS AS TREASURER OF THE STATE OF NEBRASKA

May It Please the Court:

Your petitioner, Willis M. Stebbins as Treasurer of the State of Nebraska, suggests that there is a diminution of the record in the above entitled cause, and respectfully moves that this Honorable Court issue its writ of certiorari herein directed to the Supreme Court of the State of Nebraska, commanding that court to certify and send to this court certain papers which are of record in that court in this cause. These papers are particularly described as follows:

"Answer and cross-petition in intervention of Willis M. Stebbins as Treasurer of the State of Nebraska;

"Reply of Abie State Bank on its own behalf and on behalf of the other banks for whom said suit is brought to answer and cross-petition of intervener, Willis M. Stebbis as Treasurer of the State of Nebraska;

"Answer of Abie State Bank on its own behalf and on behalf of the other banks for whom said suit is brought to cross-petition and reply to answer of intervener, Willis M. Stebbins as Treasurer of the State of Nebraska;

"Reply of Abie State Bank for itself and the other banks named in the petition to the answer of Willis M. Stebbins as Treasurer of the State of Nebraska;

"Order of court substituting Arthur J. Weaver as Governor of the State of Nebraska, as defendant, for Adam McMullen, as Governor of the State of Nebraska;

"The motion for judgment by the defendants and intervener, Willis M. Stebbins as Treasurer, and the ruling of the trial court thereon shown at pages 383 and 384 of volume II of bill of exceptions;

"The testimony of Willis M. Stebbins, one of the parties to the suit, shown at pages 689 to 701, inclusive, of volume III, bill of exceptions."

REASONS FOR THIS MOTION

As reasons for and in support hereof, your petitioner shows:

1. This petitioner, Willis M. Stebbins as Treasurer of the State of Nebraska, was a party to this suit in the District Court of Lancaster County, Nebraska, and in the Supreme Court of the State of Nebraska as intervener with defendants, and is an appellee herein. That the foregoing pleadings by which issues were made and joined are omitted from the record brought to this court, and the evidence of this petitioner and other portions of the record aforesaid are omitted. That all of the evidence in the record introduced on behalf of the defendants was likewise offered on behalf of this petitioner.

The judgment appealed from appears at page 58 of the printed record of this court and shows your petitioner as a party to said judgment and the issues adjudicated in his favor thereby. There is one general decree. That the record in this court shows throughout this petitioner as a party thereto.

That your petitioner, Willis M. Stebbins as Treasurer of the State of Nebraska, has over two million dollars of moneys of the State of Nebraska in closed state banks of Nebraska, and to be affected by the result of this suit, and with reference to which issues were made and joined in the pleadings sought to be incorporated in the record

in this court, and the issues thus made were adjudicated in the decision of the Supreme Court of Nebraska.

2. That said pleadings and portions of the record are indispensable to the presentation, hearing and determination of this suit; and especially as to this petitioner.

3. Said pleadings, evidence, motion and court order are a part of the record and are important both on procedure and on the merits.

4. The questions raised in this court in this case require for their proper understanding and decision that said part of the record be before the court.

WHEREFORE, your petitioner prays that a writ of certiorari be issued out of and under the seal of this honorable court, directed to the Supreme Court of the State of Nebraska, commanding that court to certify and send to this court the papers enumerated herein.

Your petitioner has ordered from the clerk of the Supreme Court of the State of Nebraska a certified transcript of the foregoing parts of the record, and as soon as the same can be obtained, will have them printed and filed herewith. That it has been impractical to secure the same to print and file concurrently with this petition.

C. E. ABBOTT,

C. A. SORENSEN, Attorney General,
Counsel for Willis M. Stebbins as Treasurer of the State of Nebraska, Appellee.

STATE OF NEBRASKA, }
} ss.
LANCASTER COUNTY, }

I, C. A. SORENSEN, Counsel for Willis M. Stebbins as Treasurer of the State of Nebraska in the above entitled cause, do solemnly swear that the facts recited in the foregoing "Suggestion of a Diminution of the Record and Motion for Writ of Certiorari" are true.

C. A. SORENSEN,
Counsel for Willis M. Stebbins.

Sworn to and subscribed before me this 4th day of August, 1930.

(SEAL)

FRIEDA C. BAYERLEIN,
Notary Public in and for
Lancaster County, Nebraska.

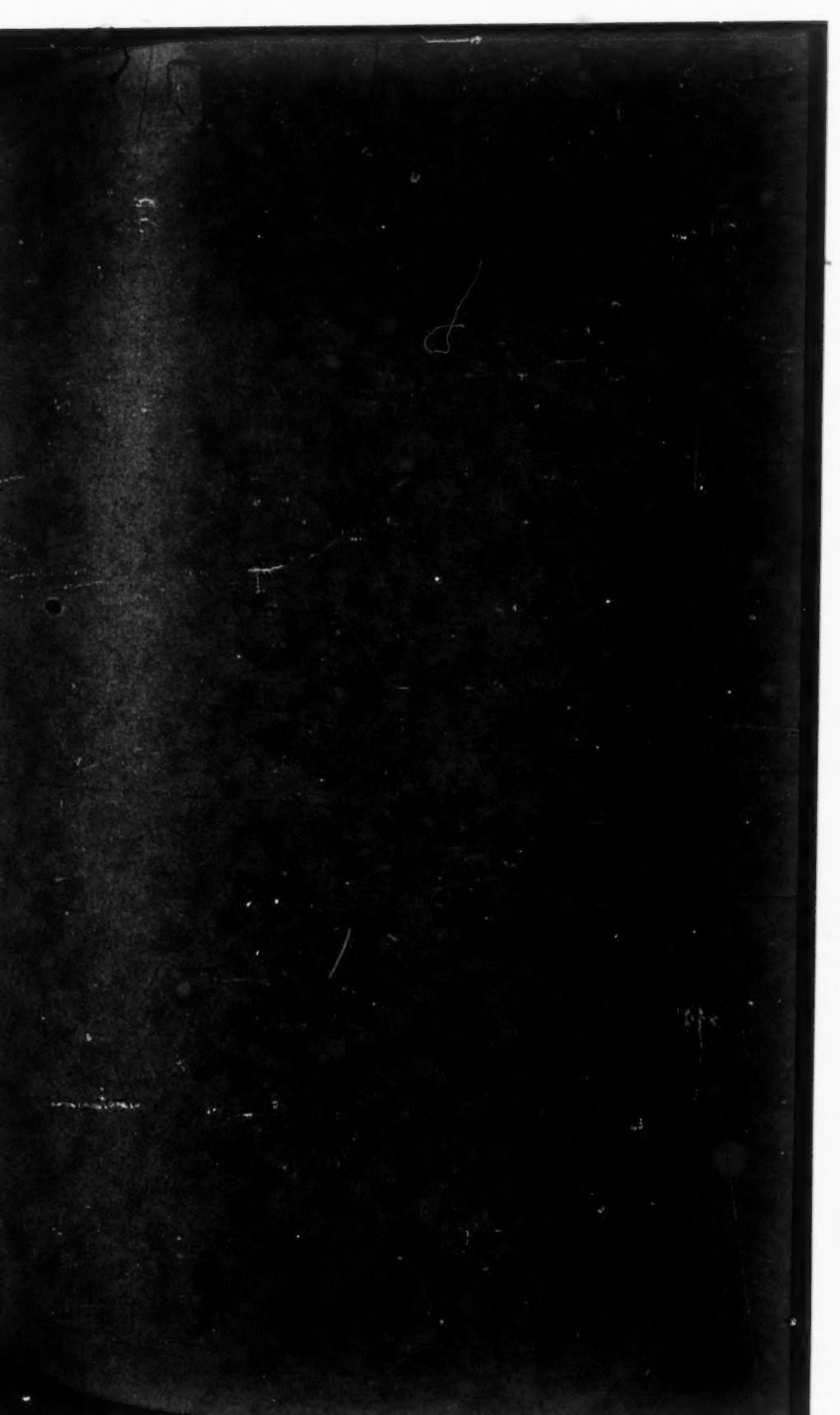
JOINDER IN FOREGOING SUGGESTION OF DIMINUTION OF RECORD AND MOTION

Comes now Arthur J. Weaver as Governor of the State of Nebraska, and Clarence G. Bliss as Secretary of the Department of Trade and Commerce, appellees in the above suit, and acknowledge service upon them of a copy of the foregoing "Suggestion of a Diminution of the Record and Motion for a Writ of Certiorari", and acknowledge service of notice of hearing thereon, and these appellees

join in said motion and respectfully represent that said portions of the record are indispensable to a full consideration and determination of this case in this court.

ARTHUR J. WEAVER as Governor of the State of Nebraska, and CLARENCE G. BLISS, as Secretary of the Department of Trade and Commerce.

By C. A. SORENSEN,
Attorney General,
State of Nebraska.



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AUG 11 19[illegible]

No. 34881

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1930

No. 63

ABIE STATE BANK, APPELLANT,

VS.

ARTHUR J. WEAVER AS GOVERNOR OF THE STATE OF NEBRASKA; CLARENCE G. BLISS AS SECRETARY OF THE DEPARTMENT OF TRADE AND COMMERCE, APPELLEES;

WILLIS M. STEBBINS AS TREASURER OF THE STATE OF NEBRASKA, APPELLEE;

MARY E. GANDY, JAMES H. COVEY, THEODORE H. BUELT, HUFFMAN & SEYMOUR, INC. (A CORPORATION), LEONARD N. SEYMOUR, JOHN HALBUR AND FRANK N. HEBENSTREIT, APPELLEES.

SUGGESTION OF A DIMINUTION OF THE RECORD AND MOTION FOR A WRIT OF CERTIORARI

JAY C. RODGERS, Law Brief Printer, 130 North Fourteenth St., Lincoln, Nebr.

No. 34881

IN THE

SUPREME COURT

OF THE

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October Term, 1930

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ABIE STATE BANK, APPELLANT,

VS.

ARTHUR J. WEAVER AS GOVERNOR OF THE STATE OF NEBRASKA; CLARENCE G. BLISS AS SECRETARY OF THE DEPARTMENT OF TRADE AND COMMERCE, APPELLEES;

WILLIS M. STEBBINS AS TREASURER OF THE STATE OF NEBRASKA, APPELLEE;

MARY E. GANDY, JAMES H. COVEY, THEODORE H. BUELT, HUFFMAN & SEYMOUR, INC. (A CORPORATION), LEONARD N. SEYMOUR, JOHN HALBUR AND FRANK N. HEBENSTREIT, APPELLEES.

SUGGESTION OF A DIMINUTION OF THE RECORD AND MOTION FOR A WRIT OF CERTIORARI

May It Please the Court:

Your petitioners, Mary E. Gandy, James H. Covey, Theodore H. Buelt, Huffman & Seymour, Inc. (a corporation), Leonard N. Seymour, John Halbur and Frank N. Hebenstreit, suggest that there is a diminution of the record in the above entitled cause and respectfully move that this Honorable Court issue its writ of certiorari herein directed to the Supreme Court of the State of Nebraska, commanding that court to certify and send to this court certain papers which are of record in that court in this cause. These papers are particularly described as follows:

Demurrers of interveners, Frank A. Hebenstreit and John Halbur.

Order overruling demurrers of Frank A. Hebenstreit and John Halbur.

Answer and cross-petition of intervener, Mary E. Gandy.

Answer and cross-petition in intervention of James H. Covey, Theodore H. Buelt, Huffman & Seymour, Inc. (a corporation), and Leonard N. Seymour.

Answer of Abie State Bank on its own behalf and on behalf of the other banks for whom said suit is brought to cross-petition and reply to answer of interveners, James H. Covey, et al.

Answer of Abie State Bank on its own behalf and on behalf of the others for whom suit is brought to the cross-petition of intervener, Mary E. Gandy, and reply to answer of Mary E. Gandy.

Reply of Abie State Bank for itself and the other banks named in the petition to the answer of all the defendants and interveners.

Order of court substituting Arthur J. Weaver as Governor of the State of Nebraska, as defendant, for Adam McMullen, as Governor of the State of Nebraska.

The stipulation entered in open court as to interveners, James H. Covey, Theodore H. Buelt, Leonard N. Seymour, John Halbur, Huffman & Seymour, Inc., a corporation, stipulating and admitting certain of the issues made by the pleadings as to them, and being pages 192, 193, 194 and the first ten lines of page 195 of volume 1 of the bill of exceptions.

The testimony of F. A. Hebenstreit, intervener and cross-petitioner, and stipulation in reference thereto, being pages 348 to the middle of page 353, inclusive, of Volume 2, bill of exceptions.

The motions for judgment by the defendants and all interveners except intervener Stebbins, and the ruling of the trial court thereon, shown at pages 383 and 384 of volume 2 of bill of exceptions.

The testimony of Charles W. Bryan shown at pages 712 to the middle of page 716 of volume 3, bill of exceptions.

REASONS FOR THIS MOTION

As reasons for and in support hereof, your petitioners show:

1. Your petitioners, Mary E. Gandy, James H. Covey, Theodore H. Buelt, Huffman & Seymour, Inc., Leonard N. Seymour, John Halbur and Frank N. Hebenstreit, were parties to this action in the District Court of Lancaster County, Nebraska, and in the Supreme Court of the State

of Nebraska as interveners with defendants, and are appellees herein. The foregoing pleadings, by which the sufficiency of the plaintiff's petition to state a cause of action was challenged, and also by which issues were made and joined, are omitted from the record brought to this court, and the evidence of these petitioners offered and received as portions of the record aforesaid is omitted. All of the evidence in the record introduced on behalf of defendants was likewise received on behalf of these petitioners.

The judgment appealed from appears at page 58 of the printed record of this court, and shows your petitioners as parties to said judgment and the issues adjudicated in their favor therein. There is one general decree, and the rights of the petitioners and all other parties are determined therein.

Your petitioners were depositors in state banks with claims, mostly adjudicated, against state banks, and joined issues and presented evidence on behalf of themselves and all other depositors similarly situated, and by their representative action over $5,000,000 of claims were affected.

Your petitioners on behalf of themselves and other depositors similarly situated presented the issue of their contractual rights with plaintiff banks and also the issue of estoppel as to their matured claims from deposits in failed banks, some of which were adjudicated claims against the depositors' Guaranty Fund, and petitioners also prayed for affirmative relief against plaintiff banks.

2. Said pleadings and portions of the record are indispensable to the presentation, hearing and determination

of this suit; and especially as to these petitioners and other depositors on whose behalf they appear in this action.

3. Said pleadings, evidence, motion and court order are a part of the record, and are important both in procedure and on the merits.

4. Said pleadings and record are essential to a proper understanding and decision of this case by this court upon review.

WHEREFORE, your petitioners pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Nebraska, commanding that court to certify and send to this court the papers enumerated herein.

Your petitioners have ordered from the clerk of the Supreme Court of the State of Nebraska a certified transcript of the foregoing parts of the record, and as soon as the same can be obtained, will have same printed and filed herewith. It has been impractical to secure the same to print and file concurrently with this petition.

WILLIAM J. HOTZ,
CLINTON J. CAMPBELL,
FRANK A. HEBENSTREIT,
RALPH G. COAD,
ROBERT H. HOTZ,
HENRY R. GOWER,
Counsel for Mary E. Gandy, James H. Covey, Theodore H. Buelt, Huffman & Seymour, Inc., Leonard N. Seymour, John Halbur and Frank N. Hebenstreit, Appellees.

UNITED STATES OF AMERICA
DISTRICT OF COLUMBIA
CITY OF WASHINGTON } ss.

I, Henry R. Gower, Counsel for Mary E. Gandy, James H. Covey, Theodore H. Buelt, Huffman & Seymour, Inc., Leonard N. Seymour, John Halbur and Frank N. Hebenstreit in the above entitled cause, do solemnly swear that the facts recited in the foregoing "Suggestion of a Diminution of the Record and Motion for a Writ of Certiorari" are true.

HENRY R. GOWER,
Counsel for Mary E. Gandy, James H. Covey, Theodore H. Buelt, Huffman & Seymour, Inc., Leonard N. Seymour, John Halbur and Frank N. Hebenstreit.

Sworn to and subscribed before me this 11th day of August, 1930.

Louis F. Olga
(SEAL) *Notary Public.* DC

JOINDER IN FOREGOING SUGGESTION OF DIMINUTION OF RECORD AND MOTION

Comes now Arthur J. Weaver as Governor of the State of Nebraska, and Clarence G. Bliss as Secretary of the Department of Trade and Commerce, appellees in the above

suit, and acknowledge service upon them of a copy of the foregoing "Suggestion of a Diminution of the Record and Motion for a Writ of Certiorari", and acknowledge service of notice of hearing thereon, and these appellees join in said motion and respectfully represent that said portions of the record are indispensible to a full consideration and determination of this case in this court.

ARTHUR J. WEAVER as Governor of the State of Nebraska, and CLARENCE G. BLISS as Secretary of the Department of Trade and Commerce.

By C. A. SORENSEN,
Attorney General,
State of Nebraska.

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OCT 6 1930

No. 34881

IN THE
Supreme Court of the United States

OCTOBER TERM, 1930

No. 63

ABIE STATE BANK, APPELLANT,

VS.

ARTHUR J. WEAVER AS GOVERNOR OF THE STATE OF NEBRASKA; CLARENCE G. BLISS AS SECRETARY OF THE DEPARTMENT OF TRADE AND COMMERCE, APPELLEES;

WILLIS M. STEBBINS AS TREASURER OF THE STATE OF NEBRASKA, APPELLEE;

MARY E. GANDY, JAMES H. COVEY, THEODORE H. BUELT, HUFFMAN & SEYMOUR, INC., (A CORPORATION), LEONARD N. SEYMOUR, JOHN HALBUR AND FRANK N. HEBENSTREIT, APPELLEES.

REPLY TO RESISTANCE OF APPELLANT TO MOTION OF INTERVENERS

C. A. SORENSEN,

C. E. ABBOTT,

Attorneys for Willis M. Stebbins, Treasurer of the State of Nebraska, Intervener and Appellee.

WILLIAM J. HOTZ, RALPH G. COAD,

CLINTON J. CAMPBELL, ROBERT H. HOTZ,

FRANK A. HEBENSTREIT, HENRY R. GOWER,

Attorneys for Mary E. Gandy, et al, Interveners and Appellees.

JAY O. RODGERS, LAW BRIEF PRINTER, 130 North Fourteenth St., Lincoln, Nebr.

No. 34881

IN THE
Supreme Court of the United States

OCTOBER TERM, 1930

No. 63

ABIE STATE BANK, APPELLANT,

VS.

ARTHUR J. WEAVER AS GOVERNOR OF THE STATE OF NEBRASKA; CLARENCE G. BLISS AS SECRETARY OF THE DEPARTMENT OF TRADE AND COMMERCE, APPELLEES;

WILLIS M. STEBBINS AS TREASURER OF THE STATE OF NEBRASKA, APPELLEE;

MARY E. GANDY, JAMES H. COVEY, THEODORE H. BUELT, HUFFMAN & SEYMOUR, INC., (A CORPORATION), LEONARD N. SEYMOUR, JOHN HALBUR AND FRANK N. HEBENSTREIT, APPELLEES.

REPLY TO RESISTANCE OF APPELLANT TO MOTION OF INTERVENERS

In its resistance appellant states:

> "The cross-petitions of the interveners were dismissed by the decree of the District Court (Tr. of Rec., page 41), and there is no mention of the interveners in the judgment of the Supreme Court nor in the opinion in said case."

It is true that interveners were defeated in the District Court of Nebraska. So were all other defendants. The statement that interveners were not mentioned in the judgment or in the opinion of the Supreme Court is untrue.

The Supreme Court in its opinion said:

> "The state treasurer and a number of individual bank depositors intervened in the action adversely to the plaintiff's contention. The court, however, found generally in favor of the plaintiff bank and against the defendants and interveners. Thereupon defendants were ordered to pay all costs of the action, except those incurred by the interveners, and the cross-petitions of the interveners were dismissed, and interveners ordered to pay their own costs. Defendants and a number of the interveners have appealed." (See Trans of Rec., page 60.)

In its resistance appellant also states:

> "The issues raised by them (interveners) are the same as those presented by the defendant."

This is not correct. The record of the interveners is being printed by the clerk of the Supreme Court of the United States and cannot be referred to by page. It will show that interveners, on behalf of themselves and other depositors similarly situated, in light of specific facts pleaded and proved by them, raised the issue of vested contractual rights existing between themselves and appellant banks and that they prayed for affirmative relief by reason thereof.

In its resistance appellant also states:

> "At this late date they (interveners) should not be heard to complain as the brief of appellant is in the printer's hands."

Interveners were parties specifically named with defendants in Nebraska Supreme Court judgment title and generally and award costs.

Appellant's resistance containing this statement was served on interveners on September 30, 1930. Interveners' motion for Writ of Certiorari and Diminution of the Record was served on appellant prior to August 11, 1930, and was filed in the Supreme Court of the United States on August 11, 1930. This was a month and three weeks prior to the printing of appellant's brief.

WILLIS M. STEBBINS as Treasurer of the State of Nebraska,
Appellee,

By C. A. SORENSEN,
C. E. ABBOTT,
His Attorneys.

MARY E. GANDY, JAMES H. COVEY, THEODORE H. BUELT, HUFFMAN & SEYMOUR, INC. (A Corporation), LEONARD N. SEYMOUR, JOHN HALBUR AND FRANK N. HEBENSTREIT,
Appellees.

By WILLIAM J. HOTZ, CLINTON J. CAMPBELL, FRANK A. HEBENSTREIT, RALPH G. COAD, ROBERT H. HOTZ, AND HENRY R. GOWER,
Their Attorneys.

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Number 34881

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1930
Number 63

ABIE STATE BANK, APPELLANT,

VS.

ARTHUR J. WEAVER, AS GOVERNOR OF THE STATE OF NEBRASKA, CLARENCE G. BLISS, AS SECRETARY OF THE DEPARTMENT OF TRADE AND COMMERCE, APPELLEES,

WILLIS M. STEBBINS, AS TREASURER OF THE STATE OF NEBRASKA, INTERVENER, AND MARY E. GANDY, ET AL., INTERVENERS, APPELLEES

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEBRASKA

Brief of Arthur J. Weaver, as Governor, Clarence G. Bliss, as Secretary, Etc., and Willis M. Stebbins, as State Treasurer, Intervener, Appellees.

C. A. SORENSEN, Attorney General,
C. E. ABBOTT, Special Counsel,
Attorneys for Said Appellees.

JAY O. RODGERS, LAW BRIEF PRINTER, 130 North Fourteenth St., Lincoln, Nebr.

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(b) Pleaded acts, representations and conduct of all the banks constituting waiver and estoppel, and especially those inducing the deposits of depositors with adjudicated claims; the latter's vested rights to continuance of assessments; and the prior adjudication of the validity of the act 4

(c) The State Treasurer further pleaded specifically his status as claimant and the acts of the banks inducing his deposits of public funds without bonds in banks now failed 4

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5. The Opinion and Judgment of the Supreme Court of Nebraska in Appellees' favor was a general one on all the issues on a trial *de novo* in that court; such trial

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Number 34881

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1930
Number 63

ABIE STATE BANK, APPELLANT,

VS.

ARTHUR J. WEAVER, AS GOVERNOR OF THE STATE OF NEBRASKA, CLARENCE G. BLISS, AS SECRETARY OF THE DEPARTMENT OF TRADE AND COMMERCE, APPELLEES,

WILLIS M. STEBBINS, AS TREASURER OF THE STATE OF NEBRASKA, INTERVENER, AND MARY E. GANDY, ET AL., INTERVENERS, APPELLEES

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEBRASKA

Brief of Arthur J. Weaver, as Governor, Clarence G. Bliss, as Secretary, Etc., and Willis M. Stebbins, as State Treasurer, Intervener, Appellees.

C. A. SORENSEN, Attorney General,
C. E. ABBOTT, Special Counsel,
Attorneys for Said Appellees.

1. THE QUESTION OF JURISDICTION—HERETOFORE POSTPONED FOR LATER CONSIDERATION.

The appellants have appealed from a decision of the Nebraska Supreme Court in *Abie State Bank* v. *Weaver*, 119 Neb. 153, 227 N. W. 922.

Appellees, Arthur J. Weaver, as Governor of the State of Nebraska, and Clarence G. Bliss, as Secretary of the Department of Trade and Commerce, have heretofore, in compliance with Rule Twelve of this court, filed a "Statement of Matters Against Jurisdiction" with brief in support thereof and consideration of the same was, by order of this court, postponed until the hearing on the merits.

These appellees respectfully refer to the said Statement and brief and to the abstract of the evidence in this brief. It will conclusively show that the estoppel *in pais* found and adjudged by the Nebraska Supreme Court was established beyond question and that the banks' evidence failed to establish a state of facts putting any constitutional right in issue.

The authorities on this issue are further assembled and discussed under Propositions of Law Numbers 15 to 19, inclusive, of this brief. To these also we respectfully refer on this issue.

Attention is also called to the fact that on "suggestion of diminution of record" there was an additional printed record prepared and it is referred to herein as "Supp. Rec."

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2. STATEMENT OF THE CASE.

This suit was commenced in the District Court of Lancaster County, Nebraska, by the appellants to enjoin the defendant officers from levying and collecting special assessments under the Nebraska Guarantee Fund Law for application on claims against the fund for deposits which

had been adjudicated against and ordered paid from the fund by the several District Courts of Nebraska during the two years preceding. The law had been fully operative as an adjudicated valid act for seventeen years prior to the institution of this suit.

---

3. Appellants' contentions are limited to the special assessment section as having "become oppressive and confiscatory"; they do not attack the other sections of the Guarantee Fund Law under which they exist and enjoy benefits.

Appellants give in outline on pages 4 to 5 of their brief some of the provisions of the Nebraska Guarantee Fund Law. They assail only one section of this law, to-wit, Section 8028, Compiled Statutes of Nebraska for 1922 (as amended by sec. 26, ch. 191, Laws of 1923, page 452), which provides that special assessments, in an amount not exceeding one-half of one per cent of the average daily deposits in any one year, may be levied when the amount in the Depositors' Guarantee Fund is reduced below a specified amount.

The remainder of the law providing for the creation of the Guarantee Fund (Sec. 8024), the regular assessments of one-tenth of one per cent on the average daily deposits (Sec. 8026), the sections relating to the management of the fund and the liquidation of failed banks, and Section 8027 providing that banks operating under the Guarantee Fund Law shall not be required to give depository bonds for public money deposited with them, are not questioned. Only Section 8028 providing for the special assessment is claimed to be unconstitutional (Petition, Rec. p. 1). Their question is one, then, as to degree

of assessment. The grounds upon which this section is assailed are set forth in substance in appellants' statement.

---

4. The answers of defendants and interveners on their own behalf and on behalf of all public and private depositors in failed banks (Ans., Rec., p. 21; Sup. Rec., p. 1):

(a) Denied specifically the averments of fact of plaintiffs petition;

(b) Pleaded acts, representations and conduct of all the banks constituting waiver and estoppel, and especially those inducing the deposits of depositors with adjudicated claims; the latter's vested rights to continuance of assessments; and the prior adjudication of the validity of the act;

The State Treasurer further pleaded specifically his status as claimant and acts inducing his deposits of public funds in banks now failed (Sup. Rec., p. 1).

That no cause of action was stated by plaintiffs, the question presented being in any event a legislative one and not judicial, was raised by motions and timely objection to introduction of evidence.

Defendants Pleaded Affirmatively (Rec., p. 22):

The existence of all statutory prerequisites to the making of the levy.

The existence of large public and private deposits adjudicated as claims against the Guarantee Fund and ordered paid therefrom.

That the United States Supreme Court's decision in 1911 (*Shallenberger* v. *First State Bank of Holstein, et al.*, 219 U. S. 114, 55 L. ed. 117) was conclusive of every issue involved in this case and was *res adjudicata*.

The recognition by the banks of the Holstein case decision and representation to the public by the banks that said decision was conclusive of the validity of said law and the banks' liability to assessment thereunder.

That all the banks after 1911 applied for licenses under the law; operated thereunder; and received the benefits and exercised the privileges thereof until this suit was filed.

The obligation to pay the Guarantee Fund assessments had become and was a part of the banks' articles of incorporation and charters.

The original maximum special assessment of one per cent adjudicated as valid in the Holstein case was reduced to one-half of one per cent by the legislature in 1923 at the instance of the banks.

The deposits by individuals and of public money by the state and other political subdivisions had been induced by the concerted acts and representations of all the banks that the deposits were protected by the Guarantee Fund Law; that its validity had been adjudicated by the Supreme Court of the United States; that each state bank was subject to assessment under the provisions of the law and that they would each pay the general and special assessments under the law until any deposits made under it were fully paid by said banks, and made other representations and statements (more fully set out in the

quotation of evidence hereinafter); that the plaintiff and said other banks each and all, continuously gave their representations and statements large publicity in their respective communities and throughout the state by newspaper advertisements, printed recitals on the stationery of the respective banks, personal solicitation and argument, by circulization of the public and by signs on the interior and exterior of the state banks generally; and otherwise.

All the state banks knew of and acquiesced in all of the representations and acts of each other.

Every state bank demanded and received deposits of public funds for more than fifteen years without bond on the "security of the Guarantee Fund" under an option given by the law to do this or to give bond and avoid assessments.

The legislature in 1923 at the instance of the banks intrusted the management of the Guarantee Fund to a commission selected from persons chosen by the state banks and the banks thereby actively participated in the administration of the law.

In 1923 the legislature at the request of the banks reduced the maximum rate of interest permitted to be paid on deposits from 5 per cent to 4 per cent on account of the Guarantee Fund assessments and the protection of deposits by the law and the obligations assumed by the banks thereunder.

Through the Guarantee Fund Law and the utilization thereof, the state banks more than trebled their deposits, increased their earnings, bank conditions were stabilized and banking rendered profitable.

The maximum annual assessment of $6 per $1,000 of deposits had not caused or materially contributed to any bank failure and that the number and extent of failures had been reduced by the operation of the Guarantee Fund Law. That adjudicated claims against the fund aggregated several millions of dollars and those unpaid were adjudicated and became a fixed ant final charge against and liability of the Guarantee Fund after October 1, 1927.

All of the depositors relied on and deposited their money on the faith of the aforesaid acts and representations of the banks.

The depositors in failed banks have a vested right to the payment of the amounts due them out of the Guarantee Fund and a vested contract right as against the banks to the continuation of the payment of said assessments.

The banks having stood by and permitted and actively induced deposits on the strength of the Guarantee Fund Law were guilty of gross laches in standing by without denial of their liability or the validity of the law and that by reason of said representations and statements and acts and laches, the banks are estopped to question the constitutionality of the law or the reasonableness of the assessments thereunder.

The defendant, A. J. Weaver, as Governor, further averred that he answered also on behalf of the private depositors having claims against the Fund, including the state and other governmental subdivisions with over $2,000,000 in failed banks.

The answer and cross-petition of Willis M. Stebbins, Treasurer of the State of Nebraska (Supplemental Record, p. 1), incorporated all of the foregoing defenses and further alleged:

That said representations and statements were made to him personally and to his predecessors in office by all of the state banks of the State of Nebraska to induce the State Treasurer to deposit the public funds of the state in said respective banks without any bond being given therefor and upon the express demand of each and all of said banks that they receive public deposits without bonds because of the Guarantee Fund Law exempting them therefrom.

That there were public funds in 45 state banks then insolvent and in receivership. That the deposit of these funds was induced by the acts and representations of the state banks and that these deposits had been adjudicated as claims and ordered paid from the Guarantee Fund.

That he had deposited said funds without bonds, relying on the acts and representations and promises of the banks.

That the banks were estopped and had waived their right to object to the constitutionality of the law and assessments thereunder.

That he, as Treasurer, had vested rights against the Guarantee Fund and vested contract rights against the banks for continuation of the payment of the assessments necessary.

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5. The opinion and judgment of the Supreme Court of Nebraska in appellees' favor was a general one on all

the issues on a trial de novo in that court; such trial de novo in equity suits being a statutory requirement; the opinion and judgment of the Supreme Court therefore necessarily and properly contained no reference to any finding of fact of the trial court (Rec., pp. 58, 59-65).

6. The Supreme Court of Nebraska inter alia expressly found and adjudged that the banks were estopped; the evidence was overwhelming as to all the banks and uncontradicted (Rec., p. 59).

Where the Supreme Court of the State has decided a case on the basis of waiver and estoppel, this court will concern itself only with an examination of the record to determine that there was basis in fact for such finding.

7. The volunteer memorandum opinion of the trial court on which appellants so largely rely on this appeal was wholly ignored by the Nebraska Supreme Court in its trial de novo and has no place in this record; in fact the trial court itself expressly found waiver and estoppel but applied erroneous principles of law thereto as well as to the other facts involved; and wholly ignored controlling undisputed testimony.

The appellant banks quote from the memorandum opinion and decision of the trial court and then seek to carry the deduction that the Supreme Court of Nebraska inferentially adopted some portions thereof. Nowhere in its opinion and decision did the Nebraska Supreme Court expressly or by implication quote or give any weight to any finding of fact by the trial court. The issue of waiver and estoppel and other issue were tried *de novo*.

The laws of Nebraska (Sec. 9150, Comp. Stat., 1922) provide that on appeal from the district courts to the Supreme Court of Nebraska *in equity cases*

> "It shall be the duty of the Supreme Court to retry the issue or issues of fact involved * * * * and upon trial *de novo* of such question or questions of fact, reach an independent conclusion as to what finding or findings are required under the pleadings and the evidence without reference to the conclusion reached in the district court."

So the opinion and judgment of the Supreme Court of Nebraska is an opinion and judgment in appellees' favor on trial *de novo* of all of the issues presented, both of law and of fact. Appellants' contention that the Nebraska Supreme Court did not pass on waiver and estoppel, although practically the entire syllabus and opinion is devoted to that issue and the evidence establishing it, seems nothing less than frivolous under the record in this case. The major portion of three volumes of evidence was on that issue.

May it here be noted that under the procedure in Nebraska, the syllabi is also prepared by the court and states the law of the case (Proposition of Law No. XVIII).

Appellants refer to *Holliday* v. *Brown*, 34 Neb. 232, as giving controlling importance to the syllabi over the opinion. In this Abie case the syllabi and the opinion are in perfect accord on the issues. However, this court had before it a contention similar to appellants' in the Nebraska case of *Old Colony Trust Co.* v. *Omaha*, 230 U. S. 100, in which the court said:

> "*To the state decisions here cited, counsel for the city interposes the objection that they are not well*

grounded, and that some of them go beyond what is expressed in the syllabus. * * * * *The other branch of the objection is not based upon any statute or rule of court in Nebraska, giving controlling effect to the syllabus. At most it rests upon a statement in Holliday v. Brown*, 34 Neb. 232, 51 N. W. 839, *respecting 'an unwritten rule' to that effect, but what was said upon the subject in that case has been so pointedly criticized and so far restrained in Williams v. Miles*, 68 Neb. 479, 62 L. R. A. 383, 110 Am. St. Rep. 431, 94 N. W. 705, 96 N. W. 151, 4 Ann. Cas. 306, *that it is not controlling.*"

In this Abie State Bank case in the very first paragraph of its syllabi in passing on the acts, representations and promises of the banks alleged to constitute estoppel, the Nebraska Supreme Court held (Rec., p. 59):

> "Where a state bank has accepted the benefits arising from the deposits of money pursuant to the terms of the bank Depositors' Guarantee Fund Law, such bank should not be heard, in a proper case, to make complaint of a special assessment which has been levied for the benefit of the Depositors' Guarantee Fund."

A large part of the opinion of the Nebraska Supreme Court is devoted to a discussion of the evidence on estoppel and an application of that evidence to the decision on estoppel as set forth in the syllabus. In reviewing some of the evidence on estoppel that court said (Rec., p. 62):

> "It appears from the evidence of the president of one of the largest Nebraska state banks, that he was active in the publication of 2,000 pamphlets which were distributed generally in respect of the establishment of the guaranty fund. * * * *

"In 1926, during the months of June, July, August, and September, twenty-six, full page newspaper advertisements, attractively featured with pictures and aptly prepared reading matter, appeared in one of Omaha's leading newspapers. These advertisements stressed the proposed protection that was shortly to be afforded the depositors of money in the state banks throughout Nebraska. And on one page of these advertisements, 336 banks are listed as having paid their pro rata share of the cost of the publication. The largest state bank, located in Omaha, paid between $500 and $600 as its share of the expense of this newspaper publicity. The enterprise was given wide circulation in practically every town and its suburbs where a state bank was located, by illustrated newspapers with reading matter that was calculated to attract favorable attention and the patronage as well, of those having money for bank deposit. Following are some of the headings of the illustrated pages:

"'A Story no other State Can tell'; 'No Mattress Banks in Nebraska;' 'Strong Banks make Strong States;' 'In the Hands of Skilled Bankers;' 'State Banks protect their deposits in Nebraska;' 'Nebraska is a Remarkable State;' 'Pushing your money Through the Window.' 'In Nebraska the Guarantee Works both Ways.' 'All Work together in Nebraska;' 'Safe through the Slump of Deflation Days.' 'The Men Who told the Story that no other State Can Tell' concludes the series of illustrated pages, and is followed by an enumerated list of the 336 state banks that sponsored the depositors guaranty fund enterprise.

"From the evidence it clearly appears that a majority of the state bankers throughout Nebraska, and many others as well, counted the bank depositors guaranty fund, in its inception, a valuable asset, and many predicted that this beneficent plan would add greatly to the stability of the state banks. To illus-

trate this feature of the guaranty fund law, a brief excerpt from an advertisement which appeared in January, 1928, in one of the Nebraska papers having a large circulation may be noted:

"First, there are a few state bankers here and there who have good banks and who think they are greatly imposed upon by being compelled to pay an assessment to the Guarantee Fund. This is a natural feeling as they are in no way responsible for the banks that fail. * * * * *The guarantee fund, so-called, is merely an insurance company whereby the state banks of Nebraska are the members and must pay through an assessment each other's losses up to the maximum amount of six-tenths of one per cent a year.* * * * * *Any good bank, making a fair profit, can pay this assessment without injury to itself and can do so to the great benefit of the state.*

"*First State Bank* v. *Smith*, 207 N. W. (S. Dak.) 467, is cited by defendants and is in point. The court there observed that the banks had for many years accepted the benefits of the guaranty fund law and in consequence were not then in position to resist the just claims of depositors. The court also observed that the personal rights of the individual must always yield to the 'rightful exercise of the police power.'

"It may here be noted that the maximum amount of the guaranty fund special assessment was reduced by the legislature in 1923 from one per cent. to one-half of one per cent, but subsequently the department of trade and commerce, pursuant thereto, levied the special assessment of one-fourth of one per cent, within the maximum amount now fixed by the legislature, and of which complaint is now made by the plaintiff bank on its own behalf and in behalf of 336 other state banks, as above noted.

"The paramount object, and clearly the legislative intention in the creation of the depositors bank guar-

anty fund law was first for the protection of the depositors' money in the state banks. And from the fact that, under normal banking conditions, such act would likewise benefit the state banks such banks were, at least, not unfriendly to the enactment of the law in question. But it goes without saying that there never was, nor could be, any compulsion upon the state banks to accept deposits of money on the bank guaranty basis. But money was accepted by the state banks, pursuant to the terms of the depositors guaranty fund law, and by that law such banks are clearly bound.

"The demands on the guaranty fund are burdensome but the situation before us was created, or in any event was made possible, by the legislature in the enactment of the law. It is a basic principle that it is, ordinarily, not within the province of the courts to annul a legislative act except as a last resort and in a case where no other remedy is at hand. In view of the benefits arising from the deposits of large sums of money in state banks, pursuant to the terms of the bank depositors guaranty fund, should the banks now be heard to make complaint of the special assessment of one-fourth of one per cent upon their deposits?"

In discussing its finding *that the Guarantee Fund assessments had not been a material factor in causing bank failures during the six years prior to the bringing of the suit and were not oppressive or confiscatory*, the Nebraska Supreme Court in its opinion further said (Rec. p. 62):

"In respect of the many failures of banks about this time, the cashier of a Lincoln state bank testified that, in his opinion, the failure of nearly 300 Nebraska state banks was caused largely by the general economic condition existing prior to 1928; that he did not think the bank assessments from 1923 to July 1, 1928, were a contributing factor in the failure of

banks during that period, and that, in his opinion, the guaranty fund law and the assessments collected thereunder had a steadying influence on the deposits of every state bank. Continuing, he testified that 'it is no exaggeration to say that it has accounted for at least one hundred million dollars deposited in the state banks of Nebraska which would not otherwise have been made except for the bank guaranty law.' In his opinion, the conditions of the banks and their ability to pay the assessments is 'incomparably better than in 1923'."

In concluding its opinion that court stated (Rec., p. 65):

"In view of the benefits which arose from the deposits of large sums of money in state banks, pursuant to the terms of the bank depositors' guaranty fund, should the banks now be heard to make complaint of the special assessment of one-fourth of one per cent upon their deposits? Have the observations of Mr. Justice Holmes in the Noble State Bank Case, above cited, ever been answered? If so, our attention has not been directed thereto."

Sections 1074 and 1075, Compiled Statutes of Nebraska for 1922, require the Nebraska Supreme Court to cause all of its opinions to be reported and published and they are therein referred to as the decision (Propositions of Law, Numbers 18 and 19, *infra*). This has always been the practice in that court and in this case as in all others coming to this court on appeal, the opinion as incorporating the decision was included as a part of the record by the appellants and appears at pages 59 to 65 of the Record.

Where the Supreme Court of the State has decided a case on the basis of waiver and estoppel, this court will concern itself only with an examination of the record to determine that there was basis in fact for such finding.

We understand this to be the rule in *St. Louis Malleable Casting Co.* v. *Prendegrast Construction Co.*, 43 Sup. C. Rep. 178, 260 U. S. 469 (Proposition of Law Number XV).

In that case as here, the appellants were urging that the decision of the Missouri Supreme Court on the question of waiver and estoppel was a mere statement of abstract law not applied. In the opinion by the court Justice McKenna said:

> "The only reply that counsel makes is that the court meant nothing more by its conclusion and the cases cited 'than the statement of an abstract legal principle' which was 'in no way connected up with the evidence.' It is further said that:
>
> "'Nowhere in the statement does the Supreme Court find any facts constituting an estoppel.'
>
> "The comment is not justified. Our quotations from the court's opinion established the contrary, and that the plaintiff did something more than stand by and make no protest; it availed of the benefits of the sewer."

In addition to its finding and decision with respect to waiver and estoppel, the Nebraska Supreme Court expressly held that under the facts disclosed by the Record, the special assessments as levied were not confiscatory or in violation of the 14th amendment as taking private property without due process.

Paragraph two of the syllabus is (Rec., p. 59):

> "Where a special assessment has been levied upon the state banks pursuant to the provisions of Section 8028, Comp. St. 1922, as amended by Section 26, c. 191, Laws, 1923, such assessment does not constitute the taking of private property without due process."

The memorandum opinion of the trial court as hereinbefore pointed out has no place in this record.

But in view of the extensive quotations made therefrom by the appellants, we shall necessarily devote some space in this brief to it.

The figures used by the trial court in arriving at some of its indisputably erroneous conclusions will later be clearly pointed out under appropriate headings. The trial court held that the banks had waived the right to question the constitutionality of the depositors guaranty fund law and were estopped to repudiate their obligations to the depositors with accrued claims. This conclusion was unavoidable on the evidence. In his opinion the trial judge said (Rec., p. 52):

> "I am of the opinion that the banks have waived the right to raise the constitutionality of the Depositors' Guarantee Fund Law."

However, he erroneously (as later decided by the Nebraska Supreme Court) held that public policy denied the banks the right to waive or to be estopped to question the constitutionality of the law (Rec., p. 54). He based this latter deduction on the premise that the banks were unable to pay the special assessments, charge off old losses and at the same time pay what he terms "compensatory dividends". This deduction was wholly unsupported by the evidence and not in harmony with the court's own figures. This proposition was also premised on the court's conception that the stockholders of banks as a whole were entitled to demand and receive "compensatory returns" after the banks had charged off large unrelated losses before the banks should be required to pay the Guarantee Fund Assessments required to pay the depositors with vested adjudicated claims. The premises of fact were incor-

rect and the conclusion of law erroneous. The court wholly ignored the rights of claimant depositors. The angle from which the court approached the matter will be evidenced by a few quotations from its opinion.

The trial court said (Opinion, Rec., p. 46):

> "The figures I have already given deal with the banks as a whole. They plainly show that a majority of the banks are not receiving compensatory returns upon their investment, while a fourth are receiving rather extravagant profits.
>
> WHAT IS MEANT BY CONFISCATORY?
>
> "In order that the assessments levied shall be declared confiscatory it is not necessary to show the banks in the red; it is sufficient that they do not bring results commensurate with the capital invested. This question has been before the Supreme Court of the United States in connection with the different public utilities and that court has held that the rate established must be such as will bring returns equal to those of kindred organizations operated in the same general locality.
>
> "Now the only possible purpose in levying special assessments under the Guarantee Fund Law is to pay depositors in failed banks whose claims have already been adjudicated."

The only persons who ever have need of recourse to the Guaranty Fund are those who become adjudicated claimants.

Noting the item of "other real estate" in the reports of going banks and disregarding the evidence that such real estate was in value all that it was carried at, the trial court said in the opinion (Rec., p. 45):

> "If the banks had not been required to pay the special assessment they would have been able to charge off part or all of this 'other real estate'."

As will hereinafter appear the trial court clearly disregarded the evidence as to the benefits that the banks had received from the operation of the Guarantee Fund Law during the period when the claims had been maturing and this "Other Real Estate" item accruing; he wholly disregarded the evidence that but for the Guarantee Fund Law many of the banks that are carrying this item of "other real estate" would not be existent.

The trial court, while recognizing the large earnings of the banks as a whole, recites the fact of the large losses and "charge-offs" arising and the reasons therefor and recites the advisability of "charging-off" "other real estate" acquired through the liquidation period. He then in effect imposes the responsibility for all this on the present claimant depositors, and holds that the enforcement of their right to special assessments for their benefit should be enjoined until the banks can, after charging off *said losses* and *real estate*, "receive in addition compensatory returns upon their capital" (Judgment, Rec. p. 57).

These findings and decision were made in the face of the trial court's own prior finding and decision (a decision beyond controversy required by the evidence), that the banks by their acts and conduct were chargeable with waiver and estoppel. But these he permittd them to avoid in the alleged public interest.

The opinion of the trial court is mainly premised on the figures prepared by the banks attempting to show the number of banks that did not make 6 per cent on their capital and surplus *after charging off all losses and paying all Guarantee Fund assessments*. This was the theory upon which the trial court tried the case. It is not practical to take up and devote large space to analyzing

the opinion. Some of the figures used in the trial court's calculation were clearly erroneous as will hereinafter appear, but we can not at this point go further into the facts found by and theories of the trial court without unduly burdening this brief. The extensive quotations from the record hereinafter will show how clearly erroneous how clearly erroneous were the trial court's premises were the trial court's premises.

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8. **The status of this case in the Supreme Court of the United States:**

(a) The decisions of this Court in the Bank Guarantee Fund cases, Oleomargarine cases and cases similar in principle are conclusive of this case on the pleadings and on the facts;

(b) The evidence of the banks wholly failed to support their contentions, even on their theory; in fact, a contrary state of facts was conclusively established by defendants' evidence;

(c) The evidence of defendants and interveners supporting estoppel was overwhelming as against all the banks; (estoppel was found by both Nebraska Supreme Court and trial court).

(d) The Nebraska Supreme Court adjudication on basis of estoppel in pais is final and conclusive.

The enactment of the Guarantee Fund Law was a proper exercise of the "police power" by the legislature. That was decided by this court in 1911 in the Holstein Bank case. Any modification or repeal of the law, especially

as against those with vested rights, must be, if at all, by the further exercise of that power. For these reasons and others set out in the "Propositions of Law" in this brief, defendants and interveners were entitled to judgment on the pleadings, independent of any question of fact involved.

The Bank Guarantee Fund cases, the Oleomargarine cases and others cited and quoted from hereinafter are conclusive of this case on the pleadings.

As disclosed by the record, defendants and interveners properly raised these legal questions by objections to the introduction of evidence, Record, page 80, and by motion for judgment at the conclusion of plaintiff's testimony, Record, page 213.

The detailed argument and presentation of evidence and facts as to these propositions will follow later in the brief.

SUMMARY OF THE EVIDENCE

9. There was a complete failure of proof by the banks on their contentions of facts; a contrary state of facts was conclusively established.

The appellants have omitted defendants' Exhibit 37 from the transcript brought to this court, and which contained the only data on each of the 726 banks separately.

No state bank of Nebraska, aside from the small Abie bank, appeared in the case or offered any detailed facts and figures as to its income and operating expense and the distribution thereof. *No evidence was offered by any*

bank or on its behalf as to the actual operation of or effect of the Guarantee Fund Law within that bank, or the effect of the law and its assessments upon its operations or its income, or of the relation of its assessments to its operations.

No attempt was made by plaintiffs to show normal income and disbursements and the distribution thereof; or the Guarantee Fund assessments' relation to and effect on the banks' income. No effort was made to show that banks actually operating could not pay the assessment or that the operation of the Guarantee Fund law detrimentally affected the banks' operations, earnings, etc.

Appellants do not point out any evidence of the foregoing character.

The plaintiff banks had it wholly within their power to have furnished readily and conveniently to auditors or accountants figures with respect to the details of the operation of the Guarantee Fund within their respective banks and to have made compilations thereof in a sufficient number of banks to support their contentions in this case, if such contentions were susceptible to proof. Their failure to supply a scintilla of evidence in this regard as to the relative benefit of the Guarantee Fund to banks and its effect on the operating income, raises the unavoidable deduction that their contentions were not susceptible to proof.

The plaintiffs undertook to treat the assessments paid by banks in the past as wholly without compensatory benefits and to disclaim all responsibility for accrued liabilities. They undertook arbitrarily to treat the amount of the assessment as a total loss.

They relied simply on showing the gross receipts and then the expenditures (including the Guarantee Fund assessments).

Even this evidence was not produced as to individual banks. The plaintiffs produced their Exhibits 6, 7 and 8 made up by the grouping of numbers of banks as to net earnings in each six months period. Even these exhibits were thoroughly discredited and appellants omit them from the transcript of the record in this court. This matter is covered hereinafter in detail.

The trial court having ruled adversely to the defendants on their objection to the sufficiency of the character of proof offered by the banks (motion for judgment, Rec., p. 213), the defendants then produced evidence to meet this class of evidence introduced by plaintiffs and to show the actual earnings of the banks and the cause of reduced earnings, and that these causes were unrelated to the Guarantee Fund.

We challenge especial attention of the court at this time to this complete lack of any evidence that could have supported plaintiffs' case under their theory of the principle applicable to rate cases.

The only evidence with respect to the individual bank was Exhibit 37, prepared by the banking department and introduced by defendant officers and the interveners. This exhibit consisted of data taken from the reports of the individual banks to the banking department for the period of eighteen months from January 1, 1927, to June 30, 1928, the fiscal period immediately preceding this suit. This was prepared by Payson D. Marshall, Chief of the Bureau of Banking, and was a correct reflection of the report of each of the 726 banks separately enumerated

(Mr. Marshall's testimony, Rec., pp. 427-31). This exhibit was introduced in evidence (Rec., p. 432). This was the only evidence and data on each individual bank separately named and appellants have omitted this exhibit from their record in this court. A recapitulation of Exhibit 37 showing the totals as to all the banks, appearing as Exhibit 38 (Rec., 437) and reproduced later in this brief, was prepared and introduced by defendants (pp. 431-2). This exhibit completely negatives the contentions of the plaintiffs. Exhibit 37 as stated showed the data with respect to individual banks.

Plaintiffs' witnesses and accountants, Fulk and Mooney, whose testimony is hereinafter referred to, were given free access to all the records of the banking department (Rec., pp. 132-3, Qs. 357-9), and the statement of appellants' brief that "the Department of Trade and Commerce refused at all times to permit the banks or their representatives to see or have access to the records" is untrue; there is no evidence whatever to that effect.

The defendant state officials in the public interest assumed a burden not properly required of them in a case involving the constitutionality of an act, and affirmatively showed from records of the banking department and otherwise, facts completely negativing each contention of the banks. They further showed acts and representations of the banks inducing deposits and especially the deposits of claimant depositors, that are more forcible in support of the equities of the depositors than any argument that could be advanced.

May it at this time be stressed that not only did the evidence show that the acts and representations were

by all the banks, but no attempt was made by any bank or banks to show that such bank or banks were not participants.

Appellants' brief omits important evidence and inaccurately abstracts material parts of the record. It is not practical to take up and analyze each erroneous statement; so appellees will brief this case by copying freely from the evidence and letting such quotations show the errors of appellants' brief.

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10. The Guarantee Fund Law and its small assessments never caused nor contributed materially to the failure of a single Nebraska state bank, but diminished the number of failures and was of inestimable benefit to the banks generally during the period of failures; the cause of excessive losses in going banks, and of "charge-offs" and failures are not attributable to Guarantee Fund assessments.

The whole case of the banks was premised and argued and is presented in this court on the theory that there were Guarantee Fund assessments and that there were bank failures and from those two facts they argue that the Guarantee Fund assessments were responsible for bank failures.

There was no evidence supporting their deduction.

Before affirmatively showing the cause of failures and the great benefit of the operation of the Guarantee Fund in reducing failures, let it be said that no witness testified as to any bank in the State of Nebraska, either heretofore failed or now financially embarrassed, whose condition was caused or materially contributed to by the Guar-

antee Fund assessments. In the case of the banks that failed the amount of the previous payments to the Guarantee Fund compared to their total liabilities was insignificant.

Dan V. Stephens, president of the Fremont State Bank, principal witness for plaintiffs and one of the three sponsors of the suit, was asked to name a single bank that was in receivership or in the hands of the Guarantee Fund Commission whose condition was the result of the Guarantee Fund assessments, but he could not name a single one. We quote his testimony (Rec., pp. 341-2), Qs. 3466-7-8):

> Q. "You can't name a single bank, can you, Mr. Stephens, that is in receivership or in the hands of the Guaranty Fund Commission, whose condition is the result of the Guaranty Fund assessment?"
>
> A. "I don't know whether I could or not. By refreshing my mind I might."
>
> Q. "Will you take two or three minutes and think?"
>
> A. "Now what is the use of thinking when I told you I didn't recall any?"
>
> Q. "That is your final answer, is that, that you can't recall?"
>
> A. "I can't recall it, I haven't made a specialty of that."

No other witness even attempted to name one bank whose failure was attributable to the assessments.

Referring to the condition of some banks as existing in May, 1927, and those then having capital impairment or capital impairment if criticized items were charged off, Mr. Bliss stated that the Guarantee Fund assessments paid by those banks had cut no appreciable figure in their then

condition as he found them (Rec., p. 199, Q. 941) and that as to existing banks they had charged the assessments out of their earnings and taken care of them from year to year (Rec., p. 202, Q. 965).

Mr. Woods, a banker, and highly qualified witness, as will hereinafter appear, testified (Rec., p. 246, Q. 1263):

> Q. "In your opinion, Mr. Woods, has the Guarantee Fund assessments of six-tenths per cent from 1923 to July 1, 1928, been a materially contributing factor in the failure of banks during that period?"
>
> A. "I think not."

In January, 1928, the state banks through their spokesman, Dan V. Stephens, chief witness in this case, and by paid advertising broadcast the following statement (Orig. Trans., p. 474, vol. 3, Exh. P):

> "This limit (of assessment) in the case of the Bank Guarantee Fund, which fund is used for the benefit of paying depositors in failed banks, is fixed at 6/10 of 1%. * * * * *In other words, a bank that fails fails not because it had to pay $6 a thousand to the Guarantee Fund, but for other and vital reasons.*"

The evidence with respect to bank failures and heavy losses in going banks for the period from 1920 to 1927 and the beneficial influence of the Guarantee Fund in diminishing each is more logically covered under later subdivisions of this brief, where evidence will be quoted. This will show without dispute that "in every respect and without any exception the condition of the banks is incomparably better than at any time since 1923" (Subdivisions 16, 17 and 18).

11. The law was determined constitutional in 1911 in Shallenberger v. Holstein; the special assessment was then double the one of which complaint is now made.

12. Every issue made in this Abie case was fully pleaded and determined in the Holstein case.

A complete analysis of the issues represented and determined in the Holstein bank case appears under Proposition of Law Number V of this brief and the petition therein is quoted from at some length. To avoid duplication, we shall omit further reference thereto at this point.

ACTS AND REPRESENTATIONS OF BANKS CONSTITUTING WAIVER AND ESTOPPEL; ESPECIALLY AS TO DEPOSITORS WITH MATURED UNPAID CLAIMS.

13. All the banks thereafter specifically accepted this adjudicated valid law and its benefits and its obligations and have operated thereunder without question for seventeen years.

The decision of the United States Supreme Court upholding the Guarantee Fund Law was announced in January, 1911. The state banks then had their option of doing any one of three things:

1. Liquidate and invest their capital in some other business.

2. Nationalize if they thought it would be more profitable to operate under a charter from the federal government.

3. Apply to the state banking department for a certificate of authority to operate under the new Depositors Guarantee Fund Law.

The banks exercised their choice; they filed with the banking department their application in which they agreed to comply with all the terms and conditions of the law. In due course each of the banks received a certificate of authority permitting it to operate under the law and to accept deposits to be "secured and protected" by the Guarantee Fund. The law directed that this certificate be posted in the bank. Several state banks had nationalized pending the decision of the United States Supreme Court, but thereafter, during the operative period of the law up until the trial of this case, only nine state banks nationalized while fifty national banks converted into state banks and filed their applications for license to do business under the state bank law (Rec., p. 396, Qs. 2344-50). These state banks have operated under the law after their acceptance thereof and without question for seventeen years up to the time of starting this suit.

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14. The banks continuously and extensively from 1911 to time of suit in 1928 untilized the Guarantee Fund Law by representing and advertising its adjudicated validity by the United States Supreme Court, that it was a mutual insurance plan for depositors' protection, and their own express obligations and agreements to pay assessments, etc., to induce deposits of public and private funds; this was accomplished by continuous and extensive newspaper publicity, by signs on the interior and exterior of banks, pamphlets, statements on checks and certificates of deposit and on deposit slips, by moving pictures, public speakers, resolutions at bankers' conven-

tions, personal solicitation and argument; the largest exploiting was in the three years immediately preceding the filing of this suit.

The evidence supporting this statement of fact is the principal part of three large volumes of the transcript and is so voluminous that we will burden this brief with but partial reference thereto and by the insertion of exhibits typical of those in general use. The activities were general with all the banks through the period in varying degrees of intensity as will appear. The largest activities in this regard were in the last three years, and were headed by the large state banks whose officers now sponsor this suit. For the court to have an accurate perspective of the relations that exist between the claimant depositors and these existing state banks, it is indispensable that the court read the representations and statements that were made by these banks to the depositors. The arguments that the banks used to get the deposits of these depositors are more forceful in support of the equities of the depositors than any argument that the writers of this brief can advance.

The evidence is overwhelming and undisputed of representations and conduct of the state banks, and which will be hereinafter quoted, which operated as an effective and complete waiver and estoppel of any right to assert the unconstitutionality of the special assessments. This applies especially to the existing depositor claimants who believed in and relied on said representations and conduct in making the deposits on which the *claims are founded.* This portion of the brief therefore will be almost wholly devoted to the acts and conduct of the banks during the last five years which directly induced the deposits of the

present claimants against the Guarantee Fund. The assessments levied and to be levied for a period of years will naturally go to these particular depositors.

The principal acts were the inducing of deposits by the following means:

1. The use of conspicuous signs of varying sizes on the interior and or exterior of the banks.

2. The issuance by the banks of certificates of deposit for deposits with a recital thereon that the deposits were protected by the Depositors' Guarantee Fund; similar recitals on check forms, deposit slips, letter-heads, and other printed matter, delivered to depositors.

3. The general and universal imparting to the public and depositors by word of mouth, circulars, questionnaires and extensive and large newspaper advertisements and other means that all the state banks in Nebraska were associated together for the mutual protection of depositors; that the banks were a giant co-operative insurance association under the law; that each would pay assessments until all claims were paid; that their liability had been adjudicated by the Supreme Court of the United States; that a depositor in a failed bank would be paid in any event by the existing banks; that the administration of the law was in their hands; that there was no longer any need to keep money in mattress banks; and that the receiving bank and all other banks were back of the deposit, and other similar representations.

Some newspaper advertisements were illustrated and headed with pictures of the United States Supreme Court in session determining the validity of the law, the Nebraska

State Capitol, Abraham Lincoln, the American flag and similarly effective illustrations.

The largest publicity and exploiting of the Guarantee Fund was during the three years preceding the filing of this suit, and by all the means recited above. Included therein were twenty-six full-page advertisements over a period of months, in the Omaha Bee, with a large circulation covering the whole state. These advertisements were procured to be published, contracted for and paid for by 336 state banks. The details of arrangements therefor were made at several meetings of bankers at Fremont. The last advertisement carried the names of the banks with the heading "The Men Who Told the Story That No Other State Can Tell."

The only legal requirement of the banks was to hang a certificate in their bank to the effect that they had complied with the provisions of the law. All other acts, representations, advertisements and promises on the part of the banks were purely voluntary and for the advancement of their own interests.

(a) Representations on printed matter in use and circulated; and by signs on and in bank buildings; and public addresses, etc.

The testimony showed and was uncontradicted that all the state banks of Nebraska were featuring and representing on some portion or all of their stationery, and almost universally on their checks and by advertisements on certificates of deposit, windows of bank buildings and on the exterior of the banks, the fact that their deposits were guaranteed.

Ray W. Hammond, for twenty-five years manager of the Hammond Printing Company, which had printed supplies for two or three hundred of the banks, testified in this regard and produced typical printed samples of checks and certificates of deposit printed by his firm for these banks (Exhs. L-1 to L-5, inc., p. 435, vol. 3, Orig. Trans.). Robert Chappel, manager of the Chappel Printing Company, commercial and bank printers, also testified (Rec., p. 325) that he traveled for his firm throughout northern Nebraska and six counties in southern Nebraska and that practically all the banks used the circle insignia "Deposits Protected by the Guarantee Fund of the State of Nebraska" and other signs featuring the Depositors' Guarantee Fund (Rec., p. 328, Q. 1877). He identified Exhibits H-1 to H-9 as samples of checks and certificates of deposit with "Protected by Depositors' Guarantee Fund" thereon printed and sold by his firm (Rec., p. 327, Q. 1867). The exhibits appear at page 132, volume 3, orig. transcript. The foregoing exhibits have been omitted in printing record.

Mr. Chappel stated that Guarantee Fund signs were displayed on practically all of the windows and inside the cages of the banks and that practically all the checks, letter-heads and printing that was distributed to his customers had the Guarantee Fund "cut" on them (Rec., pp. 331-2, Qs. 1903-33).

STIPULATION AS TO CHECKS, DRAFTS, etc.: At page 583, volume 3, original record, are 100 different forms of checks, certificates of deposit and deposit slips (omitted in printing), featuring the Guarantee Fund protection, and which it was stipulated were those in use for many years last past by the respective banks named thereon and furnished to their customers for their use and used by

them in their business relations with the respective banks (Stipulation, Rec., p. 399).

Referring to the photographs of exterior signs (Exhibits 27 to 33, p. 586, Vol. 111, Orig. Trans.), Secretary Bliss of the Banking Department stated that they were characteristic pictures of the signs used generally by the state banks of Nebraska throughout the period referred to and that the 100 forms of certificates, deposit slips and checks (Exhibits 24-1 to 24-100, p. 583, Vol. 3, Orig. Rec.) were those used generally by the state banks of the state (Rec. pp. 407-8, Q. 2439-41). These have been omitted in printing and the court's attention is especially urged thereto in the transcript. One feature of the publicity used was that of bankers addressing public and other meetings of citizens advocating the protective feature of the Guarantee Law and showing that it existed in favor of state banks and not national banks. These addresses received publicity through the newspapers (Rec., pp. 408-9, Qs. 2442-46).

The foregoing mentioned publicity had a favorable and stimulating effect on state banks generally, more particularly in the country towns (Rec., p. 409, Q. 2447).

These exhibits contained the above referred to wording as to the deposits being guaranteed. Typical of these exhibits are those reproduced on the immediately succeeding pages. In view of the arrangement of the words thereon and the variation in size of type (please note) some of the people came to rely on the deposits as guaranteed by the State.

May we call attention to the fact that no attempt was made to show that there was any bank in the state either plaintiff or other, which was not using this character of advertising and representation, and for that matter the other advertising in this brief referred to.

The certificate of deposit forms in use by the State Bank of Omaha, Nebraska's largest state bank, from the time of its organization to the time of the trial are also reproduced here. It will be noted that the last one is dated within ninety days of the trial. The organization of this bank under the Guaranty Fund Law, its featuring of the law and its enormous growth and prosperity will be hereinafter specifically adverted to.

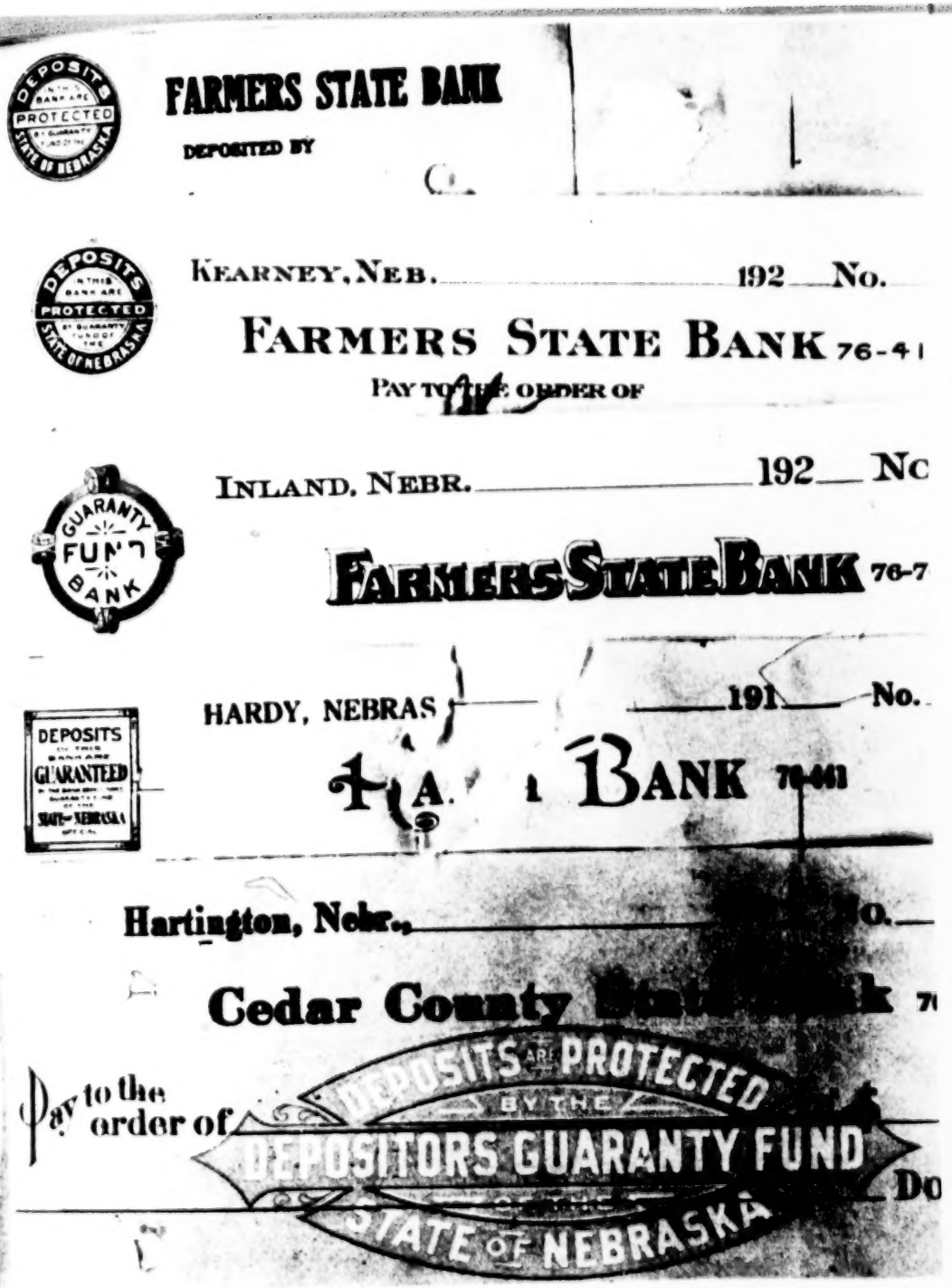
We here reproduce a few of the more than one hundred exhibits of similar character referred to above by exhibit numbers:

(b) **Forms of checks, certificates, deposits, etc., in use (exhibits);**

(c) **Form of certificate of deposit of State Bank of Omaha up to time of instituting suit (exhibits);**

(d) **Typical signs and letterheads (facsimile exhibits):**

As follows:



Typical Certificate of deposit forms, check forms, and deposit slip forms in use (Ex. 24-51 to 24-100, P. 583, V. 3 and P. 432, V. 3, H1 to H9, Ex. 17, P. 432, Orig. Trans.)

27-57

DEPOSITS ARE PROTECTED BY THE DEPOSITORS GUARANTEE FUND OF THE STATE OF NEBRASKA

The State Bank of Omaha

No. 15700

OMAHA, NEB. MAR 20 1923

HAS DEPOSITED IN THIS BANK

EXACTLY EXACTLY ONE THOUSAND DOLLARS

DOLLARS $

PAYABLE TO THE ORDER OF

IN CURRENT FUNDS

ON THE RETURN OF THIS CERTIFICATE PROPERLY ENDORSED

MONTHS AFTER DATE WITH INTEREST

AT PER CENT PER ANNUM NO INTEREST AFTER MATURITY

CERTIFICATE OF DEPOSIT
NOT SUBJECT TO CHECK

27-57

DEPOSITORS BANK PROTECTED BY GUARANTEE FUND

The State Bank of Omaha

No. 23559

OMAHA, NEB. OCT 1 1928

HAS DEPOSITED IN THIS BANK

DOLLARS $1100 00

PAYABLE TO Bussey $1100 AND 00 CTS

OR ASSIGNS IN CURRENT FUNDS

ON THE RETURN OF THIS CERTIFICATE PROPERLY ENDORSED -6- MONTHS AFTER DATE WITH INTEREST

AT -3- PER CENT PER ANNUM. NO INTEREST AFTER MATURITY.

CERTIFICATE OF DEPOSIT
NON-NEGOTIABLE
NOT SUBJECT TO CHECK

PRESIDENT CASHIER

Certificate of deposit froms continuously in use by State Bank of Omaha since its organization (Stipulation P. 225, Vol. 2, Ex. 31 and 32, P. 269, Orig. Trans.); the lower one being in use in 1928 at time of starting suit.

JOHN B GIBSON PRES
J W RANSOM V PRES

COPY

THE NEBRAS

CAPITAL
SURPLU

NORFOL

Sample of letter head in use (Ex. 41, P. 684, V. 4, Orig. Trans.)--on the letter head are also printed the words "All Deposits Guaranteed" in red letters one-fourth inch high and four inches long.

(Ex. 27 and 29, P. 586 and 587, V. 3, Orig. Trans.)--typical signs on exterior of bank buildings.

Other typical signs:

In 1929 after this suit was started (in December, 1928) the defendants took the deposition of President Schantz of the State Bank of Omaha in Omaha. This is Nebraska's largest state bank. Mr. Schantz and Mr. Stephens were the two witnesses for the banks at the trial in this case. Mr. Schantz was chairman of the committee of three instituting this suit. At the time of taking these depositions large signs were conspicuously displayed on both the exterior and interior of the banking room. They were as follows (Rec., pp. 230-2, Qs. 1184-91):

On the door of the Harney Street entrance to the bank in large letters were the words:

"Deposits Protected by the Depositors Guarantee Fund of the State of Nebraska"

Over each the customers' counters inside the bank, *six* in number, were signs *fifteen inches high and twenty inches wide*, as follows:

"SAFETY FIRST

The Deposits in This Bank Are Protected by the Depositors Guarantee Fund of the State of Nebraska."

Over the discount and paying tellers' windows was a sign *six feet ten inches long and three inches* high, as follows:

"Deposits Protected by the Depositors Guarantee Fund of the State of Nebraska."

And over each of the receiving tellers' and statement windows appeared a sign of the same size and lettering.

Over the entrance on the 16th Street side was a large sign.

"Deposits Protected by the Depositors Guarantee Fund of the State of Nebraska."

And above the doors on a large glass in the way of a transom entering from the lobby on the Sixteenth Street side was a large sign *thirty inches high and forty-eight inches wide:*

"STATE BANK OF OMAHA
Depo its Protected by the Depositors
Guarantee Fund of the State of Nebraska."

The bank occupied a business corner at Sixteenth and Harney Streets, and the foregoing advertisements on the doors appeared on the main entrance doors, and *had been there since October, 1915* (Mr. Shantz, Rec., p. 232, Q 1195).

(e) The advertising in The Omaha Bee:

The representations and advertisements by the banks reached their highest peak in a number of pamphlets broadcast by them over the state and a series of twenty-six full page advertisements in the Omaha Daily Bee. These were published and paid for by 336 state banks in 1926. Similar advertising was carried in other papers throughout the state until shortly prior to filing of the suit.

These 336 banks procured and paid for the publication and each had a written contract providing each pay its

pro rata cost of the publication (Mr. Wilson of the Bee, Rec., pp. 217-8, Qs. 1079-83). The State Bank of Omaha contributed between $500 and $600 (Rec., p. 604, Q. 3864).

Mr. Stephens and Mr. Shantz of the Fremont State Bank and First State Bank of Omaha respectively were the prime movers in procuring these publications. Mr. Stephens caused a part of the series to be reinserted in the Fremont Evening Tribune (Rec., p. 315, Qs. 1744-5). The series of advertisements in the Bee were approved and endorsed and publication authorized by a representative group of the state bankers at Fremont. Mr. Shantz and Mr. Stephens were among those present (Rec., pp. 604-5, pp. 647-48). Mr. Wilson, representative of the Bee, conferred with them several times (Rec., p. 221, Qs. 1111-3).

Mr. Kirk Griggs, the then Secretary of the Department of Trade and Commerce, was consulted for the purpose of avoiding conflict with the national banks (Rec., p. 652, Q. 4234) but he had nothing to do with advertisements and furnished none of the material. (Mr. Griggs, Rec., p. 649, Qs. 4215-7).

Appellants' statement that the Bee newspaper advertisements were initiated, sponsored and recommended by the State Departments is wholly without support in the record and was not a fact.

A letter signed by the bankers was sent out to the state banks commendatory of the plan and Mr. Shantz's name headed the list, as Mr. Griggs recalled (Rec., p. 650, Qs. 422-4).

The Omaha Bee had a daily circulation inside the city of 29,940, and outside of the city of Omaha in Nebraska of 22,000, and the list of towns served by it was sub-

stantially the same as the list of towns having state banks. An audit of the circulation of the Bee was introduced (Rec., p. 219, Ex. 28) and showed the list of towns and the distribution.

Facsimiles (in reduced size) of these 26 page advertisements appear inserted following page 238, Record, and twelve of them are reproduced in this brief on a miniature scale. Exact reproductions are at pages 240 to 265, Vol. II, Original Record. We hope the court will inspect the originals as contained in the original record.

This series was entitled "The Story No Other State Can Tell." The last of the series contained a list of the 336 banks which sponsored and paid for them. It was headed "The Men Who Told The Story That No Other State Can Tell." The plaintiff, Abie State Bank, headed the list. In the last of the series the 336 banks listed themselves and said of themselves (Exh. 27 of Exh. 13, inserted following page 238, Record; facsimile reproduced as twelfth of exhibits next following):

> "They (the banks) raised the funds, they laid out the plans and directed the writing of the chapters in this Nebraska story that has gripped the attention of the nation."

Certainly there can be no question of the authorship and responsibility of the banks for these advertisements, in view of such a statement.

Want of space above prevents our including the entire 26 in this brief. The following are typical:

A Story no other State can tell

NEBRASKA today tells a story to her sister States that no other State can tell. It is a story with a background of shadow but with highlights of courage and stamina.

The Shadows came with deflation days, but back of those shadows there was a sound law and sound bankers in Nebraska. They had the courage and the grit to see it through.

Were a title needed for this story it might be written, "Seeing It Through." Under the operation of Nebraska's sound law, the Bank Guarantee law, and in the hands of Nebraska's sound bankers, not a dollar has been lost to the depositors in Nebraska's state banks. The funds of these depositors are intact. As the liquid capital of the business firms, of the farmers, and of the workers these protected deposits are continuing to do the work of the state.

Seeing it through has called for the payment of millions of dollars to the Guarantee Fund by the state bankers of Nebraska. Under efficient supervision, with the finest spirit of co-operation and with a sacrifice of personal gain that has proved the mettle of every state banker, the Nebraska plan has been carried on until it is possible to tell this story that no other state can tell.

Each Sunday and Wednesday will appear in THE OMAHA BEE this story of Nebraska's financial strength.

It will hold a thrill for the people of Nebraska, for the men and women in business, for the farmers and the workers in field and factory. Read the chapters told in graphic form as the story unfolds. Mail them to friends in other states that they may learn of the strength and courage that has made it possible.

(Full copy Omaha Bee of Dec 2 of Dec 13. P 240 Vol 2 Bee of Dec)

Copyright, Omaha Bee, 1924.

(U. S. Sup Rec, P. 240)

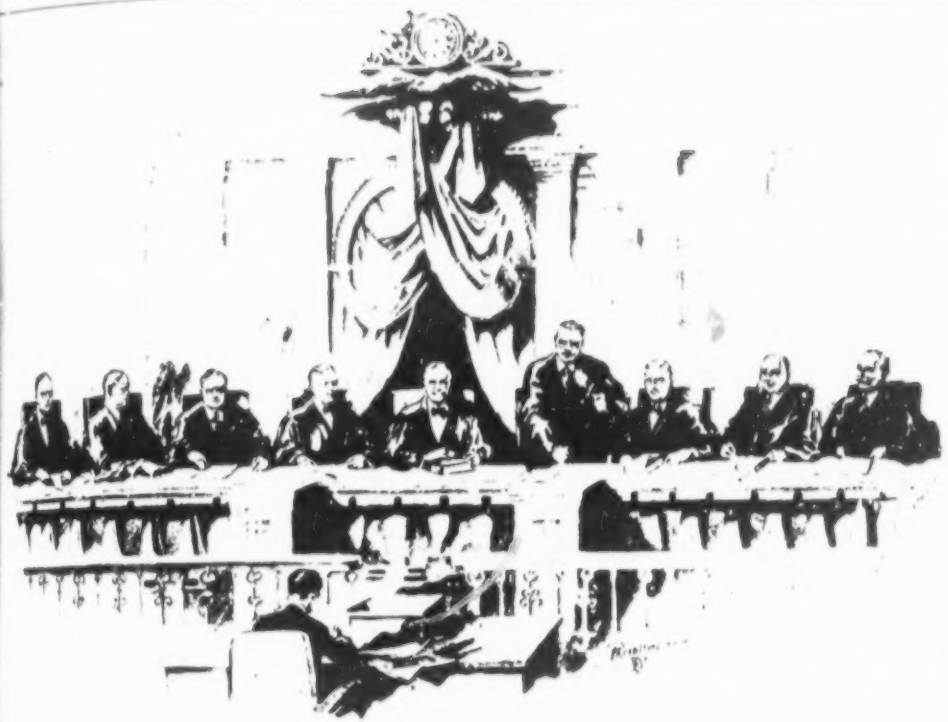
In the hands of *skilled bankers*

SKILLED bankers administer the Nebraska law that protects the deposits in Nebraska state banks. The Guarantee Fund Commission is the official body, and under the law, membership on the commission is limited to state bankers.

These banker members are appointed by the governor of Nebraska from names submitted by the bankers of the state. Thus the work of the commission is free from politics. The Secretary of Trade and Commerce in the Governor's cabinet is ex-officio chairman of the commission and in this way the elected officials of the state government co-operate with the banker selected members of the commission to insure the most efficient administration of the law.

From headquarters at the state house in Lincoln the Secretary of the Department of Trade and Commerce is in touch with every bank in the state. The constant effort of the Commission is to so handle the affairs of the failed banks as to secure the largest possible returns from the disposal of assets to the end that Nebraska's reputation for sound banking may be guarded.

(U. S. Sup. Court Rec. P 241) Ex 3 of Ex 13, p 242.



The Opinion of the Highest Court

THE constitutionality of the Bank Guarantee law of the State of Nebraska was submitted to the highest court in the nation.

In sustaining the law the court said:

> *"When the legislature (of Nebraska) declares in its banking laws that incorporation, inspection and co-operation for the protection of deposits are necessary safeguards, this court certainly cannot say that it is wrong. The power to compel beforehand, co-operation and thus, it is believed, to make a failure unlikely and a general panic almost impossible, must be recognized if government is to do its proper work.*
>
> *"In our opinion the statute before us is well within the state's constitutional power."—United States Supreme Court.*

Under the laws of the state of Nebraska the banks within the state banking system "co-operate for the protection of deposits" as outlined in the excerpts here printed from the opinion of the Supreme court of the United States.

The purpose of the laws of Nebraska and of the co-operation among the state banks is to "make a failure unlikely and a general panic almost impossible."

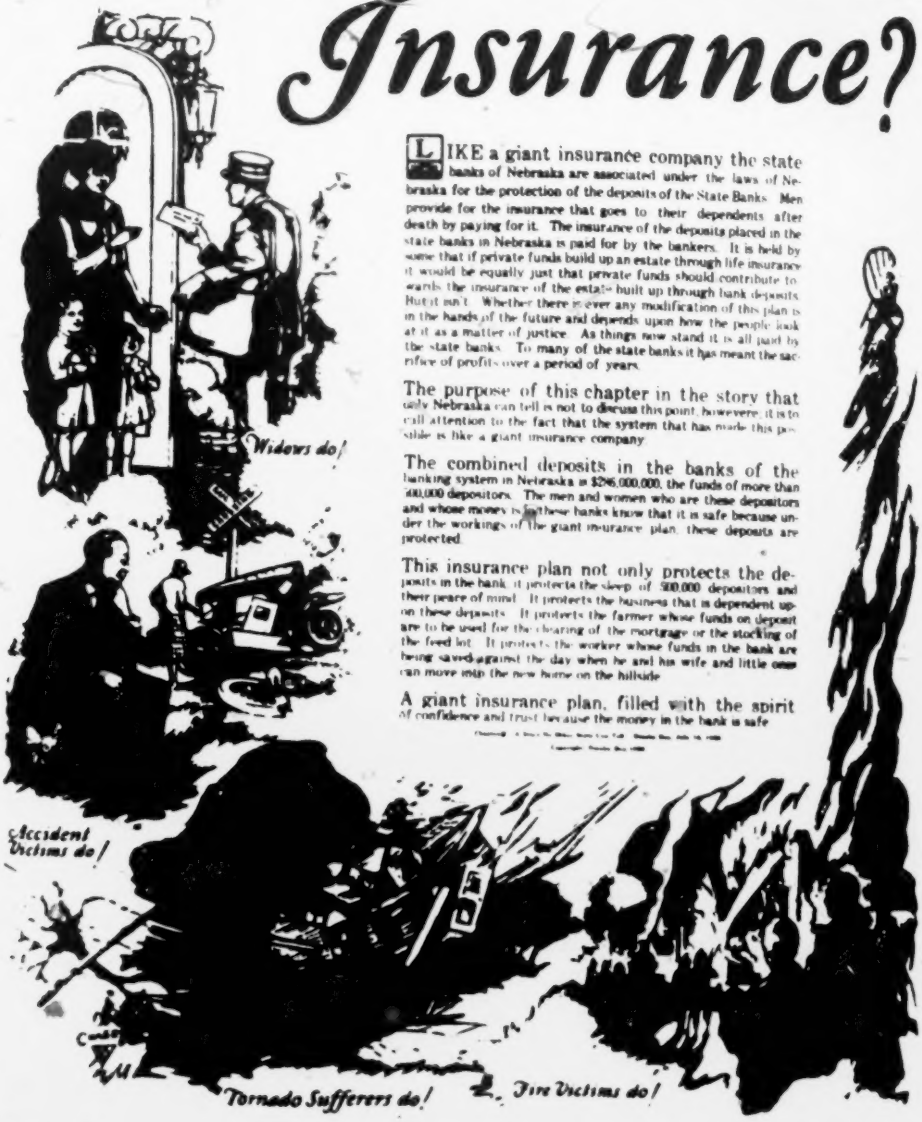
The prevention of individual failures has not yet been accomplished by the state banking system, but not a depositor in a State bank in Nebraska has lost a dollar since the law was enacted. Further experience and further operation of the Nebraska banking laws are moving in the direction of cutting individual failures to a minimum by bringing to the state banking system the counsel and experience of the state's best bankers. The program of bank co-operation has, however, made a general financial panic "almost impossible." The protected deposits in the failed banks have been kept intact and thus large portions of the liquid capital of the people of the state, have been continued at work in the business life of the state. It has increased safety and built confidence, the foundation stone of prosperity.

Copyright 1929, The Omaha Bee.

(Full page Omitted (Ex 5 of Ex 13, P 243, V 2 Bgt Ex)

(U.S. Sup. Court Rec., P. 243)

Do YOU believe in *Insurance?*



LIKE a giant insurance company the state banks of Nebraska are associated under the laws of Nebraska for the protection of the deposits of the State Banks. Men provide for the insurance that goes to their dependents after death by paying for it. The insurance of the deposits placed in the state banks in Nebraska is paid for by the bankers. It is held by some that if private funds build up an estate through life insurance it would be equally just that private funds should contribute towards the insurance of the estate built up through bank deposits. But it isn't. Whether there is ever any modification of this plan is in the hands of the future and depends upon how the people look at it as a matter of justice. As things now stand it is all paid by the state banks. To many of the state banks it has meant the sacrifice of profits over a period of years.

The purpose of this chapter in the story that only Nebraska can tell is not to discuss this point, however, it is to call attention to the fact that the system that has made this possible is like a giant insurance company.

The combined deposits in the banks of the banking system in Nebraska is $246,000,000, the funds of more than 400,000 depositors. The men and women who are these depositors and whose money is in these banks know that it is safe because under the workings of the giant insurance plan, these deposits are protected.

This insurance plan not only protects the deposits in the bank, it protects the sleep of 400,000 depositors and their peace of mind. It protects the business that is dependent upon these deposits. It protects the farmer whose funds on deposit are to be used for the clearing of the mortgage or the stocking of the feed lot. It protects the worker whose funds in the bank are being saved against the day when he and his wife and little ones can move into the new home on the hillside.

A giant insurance plan, filled with the spirit of confidence and trust because the money in the bank is safe.

Copyright, Omaha Bee, 1926

Full Page in Omaha Bee Ex. 8 of Ex. P 246 Vol 2 Def Ex
(Sup Court Rec. P. 246)

Pushing your money *through the Window!*

CONFIDENCE in the banks of the United States is the greatest expression of confidence of which there is any record. It is a confidence well placed. The great banking structure of the nation is sound. Bank failures, whether they result from poor banking practices, from runs on banks, which if continued, no bank can withstand, or from dishonesty on the part of bank officials, are relatively few in number. As an expression of confidence in State banks in Nebraska these banks have total deposits of nearly $288,000,000. The deposits in the state banks in Nebraska that have failed during the last fifteen years—during which time the nation has gone through one of the greatest financial crises in its history — amounted only to about $[illegible],000,000, less than 10 per cent of the total.

Those who pushed their money through the teller's window of these failed banks may have had in their deposits the total of their life savings. It may have been the bulk of the capital with which their business was conducted. To them, the loss of these deposits would have meant real hardship and in many cases disaster.

In the State Bank System of Nebraska happily, the depositors who pushed their money through the windows of the failed banks, as well as those who pushed their money through the windows of the sound banks, have not lost a dollar.

The sound character of the state banking system in Nebraska has been built up under the Nebraska Bank Guarantee law. It is the one law of its kind that has stood the test of the financial crisis that came with the deflation period. The Nebraska state banking system stands alone with its record of not a dollar lost to depositors. When you push your money through the window remember that the story of the Nebraska state banks—

Is a Story That No Other State Can Tell

(46 12 764 13 P250, 82 764)

Copyright, 1926, The Omaha Bee.

(U.S. Sup. Court Rec., P250)

Where have we got our money *John?*

Mother--"I notice in the paper John that some banks down south have failed. Think of all the money those people down there will lose. I'm just wondering where we've got our money."

Father--"It's all right Mary, the money is in the State bank in town. I tell you that Guarantee law in Nebraska is a mighty fine thing. We can go on about our affairs and know that even if our bank goes under we will get all our money because the other state banks will make it good."

When the news was printed recently of the failure of a group of banks in two southern states it is probable there were conversations similar to that reproduced here all over Nebraska. The sense of security that is the possession of the depositors in state banks in Nebraska is one of the greatest benefits of the Nebraska Bank Guarantee law. In the old days, before the Guarantee law, a feeling of terror ran through a community whenever there was a rumor that a bank was in danger.

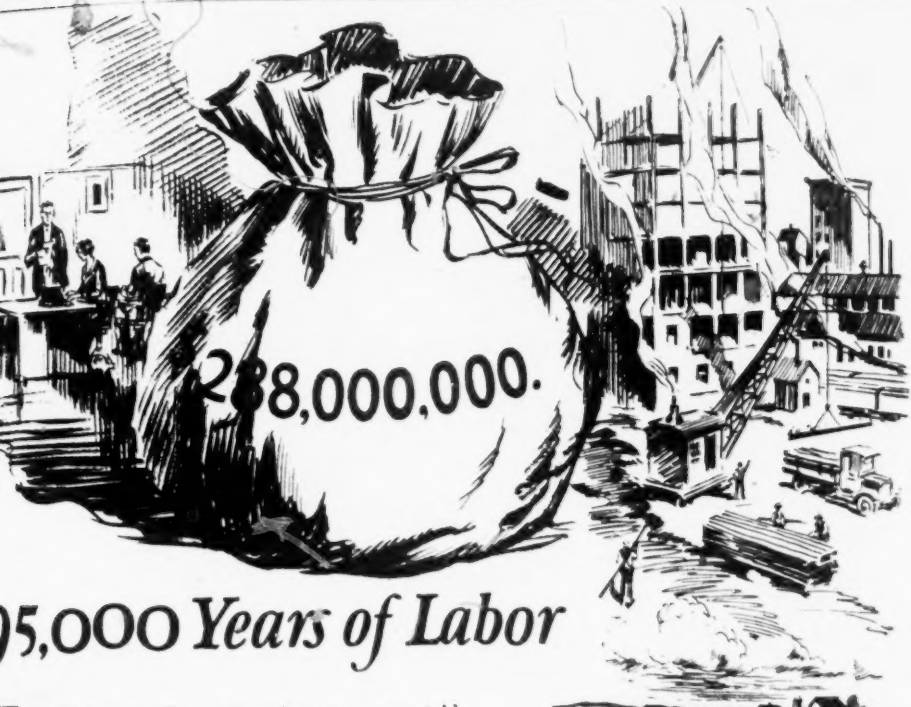
Now there are only a few casual inquiries. The depositors go about their business without uneasiness and without worry. They know that the deposits in the state banks in Nebraska are protected deposits and that even if a bank is closed and finally liquidated they will have their money returned to them in full under the operation of the Nebraska Bank Guarantee law, to which all state banks in the Nebraska state system subscribe.

This is a Story No Other State Can Tell

Chapter 15, "A Story No Other State Can Tell." The Omaha Sun, August 4, 1928. Copyright, 1928, The Omaha Sun

(Guaranty Co. v. Dunbar, 19 F. (2d) 251, 7th Cir.)

(U. S. Sup. Court Rec., P. 251)



95,000 Years of Labor

MONEY is a medium of exchange we are told. But it is much more than that. If we will remember the means through which we get money—profits—salary, wages—we will realize that money is that thing which represents our services, our labor. We do not get any money unless we render service of some sort, unless we do some sort of labor. We cannot work for everyone, but the money we get for our labor at the place where we work, either as proprietor or as employee, enables us to trade that money to others for what their labor has created.

None of the money we get we save. In saving our money we save a part of our labor. Thus our money in the bank is saved up labor that we can take out when we need it to trade to others for the fruits of their labor.

In the state banks of Nebraska there is on deposit the stored up labor of men and women, represented in $288,000,000. If one man could earn this sum at the rate of $10 a day, it would take him 28,800,000 days. That is impossible of course. But if we could command the labor of 95,000 men and women and put them to work at $10 a day it would take them all of the 300 working days of a year.

They could use none of their earnings during that time but would have to put it all in the bank.

Thus the money on deposit in the state banks in Nebraska represents a large total in stored up labor. It has been stored away in the state banks for use some day when the depositors need it.

Now we begin to realize why it is so important that these stored up millions of dollars, these stored up centuries of labor of men and women, which the state banks in Nebraska have in their custody, shall be at all times safe and certain.

When state banks fail in Nebraska the money of the depositors is not lost. Under the operation of the Nebraska Bank Guarantee law all of the banks join together to absorb the losses. This Guarantee law has been in operation in Nebraska for fifteen years and during that time the deposits in failed banks have totaled $26,000,000. This itself is nearly 9,000 years at $10 a day of the saved up labor of the men and women of Nebraska.

Small wonder that in the fifteen years the Guarantee law has been in operation among the state banks in Nebraska the deposits in these banks have grown from little more than $70,000,000 to nearly $288,000,000.

It is a splendid thing to live in Nebraska and to know that the money placed in the state banks in this state is safe. As a Nebraskan, too, it is a splendid thing to know that this is—

A STORY NO OTHER STATE CAN TELL

Copyright 1918, The Omaha Bee.

S. Sup. Court Rec., P 254)

Giving up Profits to Support a Principle

THE funds from which have been drawn the money needed to make good the deposits in the failed state banks in Nebraska have come from the profits of the banks in the Nebraska state banking system. To many of these banks the payment of the assessments needed to make good these protected deposits has taken all of their profits over a period of years. In some of the state banks not only did it take all the profits, but the stockholders were called upon to make up the needed funds out of their personal resources.

During this period the strength of the Nebraska state bankers was tested to the utmost. It is no easy thing to see profits used to pay the losses of others. One of the leading state bankers has declared that it was a picture of Abraham Lincoln in his office that gave him the courage to stick it out.

"Lincoln had a dozen opportunities to quit," he said, "but because he stuck to it, America is today the greatest nation in the world." Because the state bankers in Nebraska stuck to it, this state is today famous among the great sisterhood of states as the only state in which not a dollar of deposits has been lost through the failure of state banks.

When the people of Nebraska realize the full meaning of this they will have an even greater pride in their state bankers.

There are those unfamiliar with the workings of the Bank Guarantee law who have believed that the payment of the deposits in the failed state banks was made out of state funds. Some, even, have believed that money for this purpose has been raised through taxation. Others have believed that the state bankers increased their interest rates or in some other way "passed on" this obligation to their borrowers.

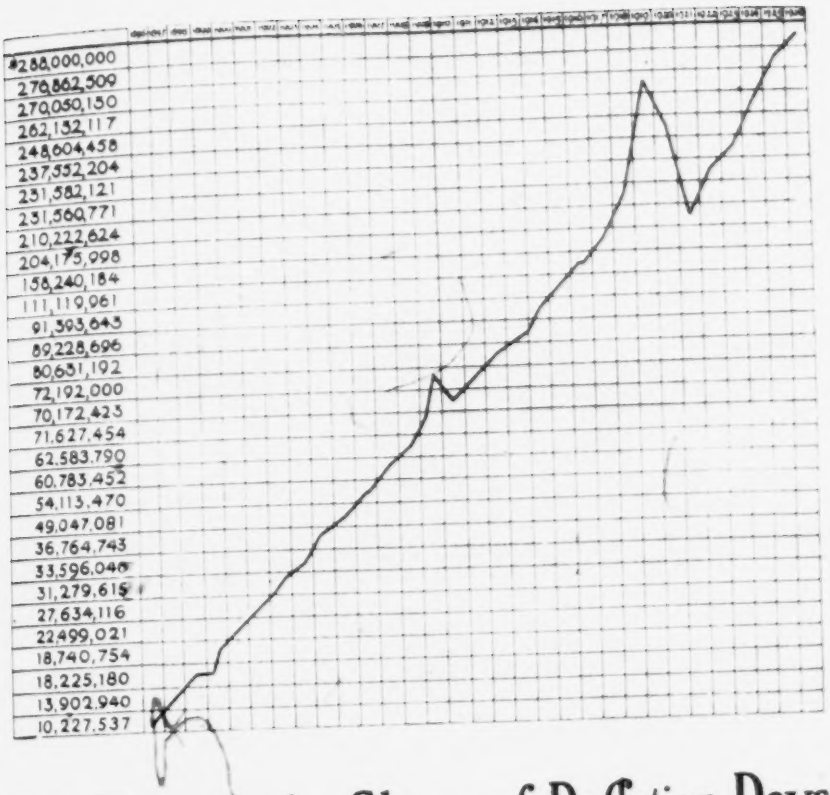
No, the money to make good these protected deposits has come out of the profits of the individual banks. Interest rates in the state banking system in Nebraska are the same as the interest rates in all banks in Nebraska. The state banks in Nebraska give to their depositors all the courtesies, all the benefits that are given by all banks. The customers of the state banks in Nebraska have had none of this great load passed on to them. The people of Nebraska have paid none of these losses through taxes or in any other way. The money has come out of profits and only out of profits.

A STORY NO OTHER STATE CAN TELL

(Full page in Omaha Bee by 10 of the 13 Pages of Type)
(Also published January 7th, 1911 with names of banks attached by the Post, 72 Type)

Copyright, 1910, The Omaha Bee.

(U. S. Sup. Court Rec., P. 258)



Safe Through the Slump of Deflation Days

The test of men and of institutions comes with adversity. If all days were fair days the record of life might be a record of constant climb without ever a setback. But all days are not fair days. Dark days come when strength and courage are put to the test. The state banks in Nebraska have gone through this test. They have come out of it stronger and better.

It took 14 years, without the guarantee law to climb from $10,000,000 to $71,000,000. Under the law, only 9 years were needed to climb from $72,000,000 to $270,000,000. The slump of deflation lasted 5 years, through the last three years of which period there was a steady climb upward from the low point of 1921. Then came a new high record in 1925 and a still further climb in 1926.

During this period, in which the largest number of state banks were forced to suspend, 1921-26, the state banking system, operating under the guarantee law, made good to the depositors of these failed state banks some $26,000,000.

With a fine courage and a strength of character developed by adversity, the Nebraska state banks have climbed back to the level of pre-deflation days and passed on beyond that level. They have won a reputation for financial soundness that has earned the praise of the nation.

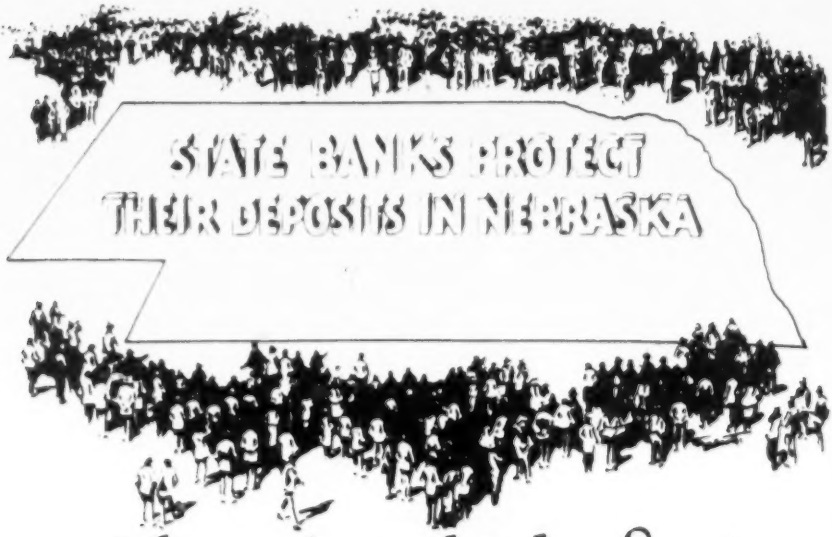
A STORY NO OTHER STATE CAN TELL

(Full page in Omaha Bee Sept 1, of Ex. 13, R. 259 Tr. R. of Ev.)

Copyright, 1926, The Omaha Bee.

Chapter 38, "A Story No Other State Can Tell," The Omaha Bee, Sept. 1, 1926.

(U. S. Sup. Court Rec., P. 259)



What others think of us!

The eyes of the nation are on the state banks in Nebraska. The Nebraska state banks won this attention through their record of financial soundness—standing up loyally in support of the Nebraska Bank Guarantee Law.

In every section of the country the record of the Nebraska state banks is known but in many places only in a general way. Because it was a record to be proud of, a group of state bankers in Nebraska determined to tell the story in full—a story that no other state can tell.

As the story has unfolded there has been an increasing demand for copies of the various chapters. All around our borders and in distant states the interest in this story has been keen and active.

As a result of its telling, figuratively, there has been written across the state in letters that all may read, the words: "State Banks in Nebraska Protect Their Deposits." Other states have sought to provide by law for the protection of deposits in state banks, but in Nebraska alone has the plan worked out. It has not been wholly because the law of Nebraska is a better law, chiefly it has been because the state bankers in Nebraska have been better bankers.

The state bankers in Nebraska realized that the law placed an obligation upon them and that when the word went out that state bankers in Nebraska were associated under the law to protect depositors there was but one thing to do—protect them. They have protected them. The weathering of the financial stress of deflation has brought a new fame to the state bankers in Nebraska. Sound banking, loyalty in meeting obligations and the courage to make the Guarantee law means what it says, has come to be known as the Nebraska Idea.

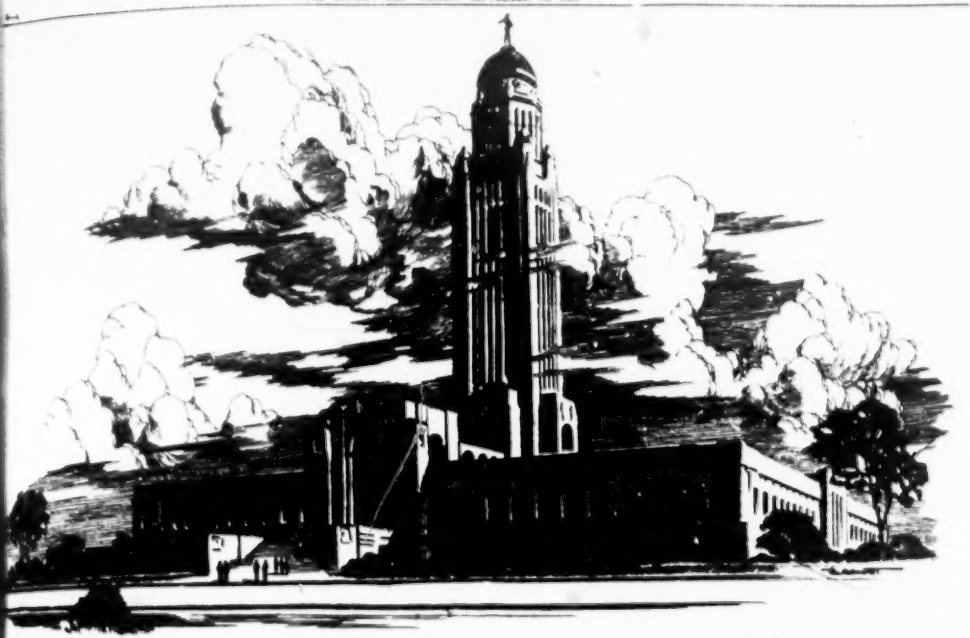
This is what others think of us. The state bankers in Nebraska are proud that it is so. They are proud of their record. It is a record of which all the people in Nebraska may be proud. It has brought added fame to a great state.

"A Story No Other State Can Tell"

(Full page in Omaha Bee for 2-7 for 13 pp. 261 U. S. Sup. Ct. Rep.)

Chapter III. "A Story No Other State Can Tell," The Omaha Bee, Sept. 6, 1925. Copyright, 1925, The Omaha Bee

(U. S. Sup. Court Rep., P. 261)



STRONG BANKS MAKE STRONG STATES

THE banks of Nebraska are the custodians of the working capital of the people of Nebraska. This working capital is the life blood of the business of the state. Business cannot be carried on without capital. Banks as the custodians of capital are inseparably connected with every business in the state. Whether the business enterprises be large or small, whether they be in cities, in towns or on the farms the banks of the state are a part of those businesses.

The importance of the state banks in Nebraska is fully appreciated when we realize the part they thus play in the life of the state. The strength and solidity of the state banks is reflected in the strength and solidity of the state. Strong banks make strong states.

The state banks in Nebraska are strong banks. They have proven their strength by their conduct during the deflation period. In Nebraska the strength of the state banks does not depend upon the strength of any individual bank. They are associated together under the Bank Guarantee law. The strength of the individual banks therefore is the strength of all the banks.

During the deflation period a few individual state banks were not able to meet the situation and they were closed. United together under the law, the banks in the Nebraska state system met the losses of deflation days however, and conquered them. Those depositors who had their working capital in the individual banks that failed, were paid dollar for dollar by the state banks, acting together, under the Guarantee Law.

The strength of these banks has kept the working capital of the state intact. Their strength has made the state strong.

Farmers in other states, business men in other states, men and women everywhere who know the value of strong banks can find that strength in Nebraska.

"A Story No Other State Can Tell"

Copyright, 1908, The Omaha Bee.

(U. S. Sup. Court Rec., P. 262)

The MEN who told the story that no other state can tell

THE men who told the story that no other state can tell are the men who control and operate the state banks in Nebraska. A group of these Nebraska state bankers felt that this story should be told to the people of the state and to the people of other states. They felt that such a record should be known to all, that there might come to Nebraska the benefits to which a strong financial foundation rightfully entitled her. They raised the funds, they laid out the plans and directed the writing of the chapters in this Nebraska story that has gripped the attention of the nation. The names of the banks which they control and operate are therefore here presented in bringing to a close the story that no other state can tell.

Abie State Bank	Abie, Neb.	Elmwood State Bank	Elmwood, Neb.	Farmers and Merchants Bank	Lexington, Neb.	State Bank of Papillion	
Citizens State Bank	Ainsworth, Neb.	The Home Bank	Elwood, Neb.	Lorn State Bank	Lorn, Neb.	Parks State Bank	
Alion State Bank	Alion, Neb.	Farmers State Bank	Emerson, Neb.	State Bank of Litchfield	Litchfield, Neb.	First State Bank	
First State Bank	Alliance, Neb.	Farmers State Bank	Ericson, Neb.	First State Bank	Lodgepole, Neb.	Commercial State Bank	
Guardian State Bank	Alliance, Neb.	Pioneer State Bank	Ewing, Neb.	Nebraska State Bank	Long Pine, Neb.	Farmers & Merchants State Bank	
Farmers State Bank	Alvena, Neb.	Ewing State Bank	Ewing, Neb.	Farmers State Bank	Loomis, Neb.	Fenner State Bank	
Commercial State Bank	Amherst, Neb.	The Citizens Bank	Fairfield, Neb.	Loretto State Bank	Loretto, Neb.	Petersburg State Bank	
Boyd County State Bank	Anoka, Neb.	Farmers and Merchants Bank	Fairfield, Neb.	Bank of Lorton	Lorton, Neb.	Pierce State Bank	
Farmers State Bank	Ansley, Neb.	Fordyce State Bank	Fordyce, Neb.	Loup City State Bank	Loup City, Neb.	Pilger State Bank	
Arlington State Bank	Arlington, Neb.	Fort Calhoun State Bank	Fort Calhoun, Neb.	Citizens State Bank	Lyons, Neb.	Security State Bank	
Arnold State Bank	Arnold, Neb.	Washington County State Bank	Fort Calhoun, Neb.	Bank of Lynch	Lynch, Neb.	Farmers State Bank	
Security State Bank	Arnold, Neb.	Fremont State Bank	Fremont, Neb.	Farmers State Bank	Lynch, Neb.	Platte County Bank	
Bank of Ashton	Ashton, Neb.	Friend State Bank	Friend, Neb.	McLean State Bank	McLean, Neb.	Pleasanton State Bank	
Ashton State Bank	Ashton, Neb.	Merchants and Farmers Bank	Friend, Neb.	State Bank of Madison	Madison, Neb.	Farmers State Bank	
Auburn State Bank	Auburn, Neb.	Farmers State Bank	Fullerton, Neb.	Madrid Exchange Bank	Madrid, Neb.	Exchange Bank	
Bank of Avoca	Avoca, Neb.	Farmers and Merchants Bank	Garrison, Neb.	Marion State Bank	Marion, Neb.	Farmers State Bank	
Farmers State Bank	Avoca, Neb.	Gothenburg State Bank	Gerinan, Neb.	Farmland State Bank	Marsland, Neb.	Bank of Orient County	
Citizens State Bank	Bancroft, Neb.	Exchange Bank	Gibbon, Neb.	Maxwell State Bank	Maxwell, Neb.	Princeton State Bank	
Commercial Bank	Bassett, Neb.	Commercial Bank	Gibbon, Neb.	State Bank of Maywood	Maywood, Neb.	Farmers State Bank	
State Bank of Bassett	Bassett, Neb.	Goodwin State Bank	Goodwin, Neb.	Security State Bank	Meadow Grove, Neb.	Farmers & Merchants Bank	
Battle Creek Valley Bank	Battle Creek, Neb.	American Bank of Gordon	Gordon, Neb.	Mt. Clare State Bank	Mt. Clare, Neb.	Richland State Bank	
Farmers State Bank	Battle Creek, Neb.	Gordon State Bank	Gordon, Neb.	Meadow Grove State Bank	Meadow Grove, Neb.	Farmers State Bank	
First State Bank	Bazile Mills, Neb.	First State Bank	Gothenburg, Neb.	The Bank of Morna	Morna, Neb.	Boone City Bank	
State Bank of Beaver Crossing	Beaver Crossing, Neb.	Farmers State Bank	Gothenburg, Neb.	The Axtone Bank	Morrison, Neb.	State Bank of Riverdale	
Beemer State Bank	Beemer, Neb.	Gothenburg State Bank	Gothenburg, Neb.	The First Bank of Miller	Miller, Neb.	Rosalie State Bank	
Farmers State Bank	Belden, Neb.	Commercial Bank of Grant	Grant, Neb.	State Bank of Montana	Montana, Neb.	Farmers State Bank	
Bank of Belgrade	Belgrade, Neb.	Greenwood State Bank	Greenwood, Neb.	Minden State Bank	Minden, Neb.	Kenesaw State Bank	
Bank of Bentleman	Bentleman, Neb.	The Farmers State Bank	Gurley, Neb.	Mitchell State Bank	Mitchell, Neb.	Bank State Bank	
Citizens State Bank	Bentleman, Neb.	Farmers State Bank	Hamlet, Neb.	The American Bank	Mitchell, Neb.	Union Bank	
Bennington State Bank	Bennington, Neb.	Banner County State Bank	Harrisburg, Neb.	Peters Valley State Bank	Monowi, Neb.	Farmers State Bank	
Haagard & Gilstoff Bank	Bennington, Neb.	Cedar County State Bank	Hartington, Neb.	Bank of Monroe	Monroe, Neb.	Farmers State Bank	
First State Bank	Bethany, Neb.	Union State Bank	Harvard, Neb.	Murray State Bank	Murray, Neb.	Sargent State Bank	
Farmers State Bank	Big Springs, Neb.	State Bank of Hastings	Hastings, Neb.	Nacora State Bank	Nacora, Neb.	Bank of Avoca	
The State Bank	Blair, Neb.	Farmers and Mechanics Bank	Havelock, Neb.	Naponee State Bank	Naponee, Neb.	Farmers State Bank	
Bank State Bank	Bloomfield, Neb.	Farmers State Bank	Hazard, Neb.	Security State Bank	Neligh, Neb.	Platte Valley State Bank	
Farmers State Bank	Bloomington, Neb.	Hartwell State Bank	Hartwell, Neb.	American State Bank	Neligh, Neb.	Commercial State Bank	
Farmers and Merchants State Bank	Bloomfield, Neb.	Bank of Henderson	Henderson, Neb.	Nemaha State Bank	Nemaha, Neb.	Northeast State Bank	
Bloomington State Bank	Bloomington, Neb.	Platteen State Bank	Herman, Neb.	American State Bank	New Castle, Neb.	Farmers State Bank	
Blue Springs State Bank	Blue Springs, Neb.	Bank of Hildreth	Hildreth, Neb.	Farmers State Bank	New Castle, Neb.	State Bank of Nebraska	
Boelus State Bank	Boelus, Neb.	Security State Bank	Holbrook, Neb.	Farmers State Bank	Newport, Neb.	Shelby State Bank	
Farmers State Bank	Boelus, Neb.	State Bank	Holdrege, Neb.	Bank County State Bank	Newport, Neb.	Hooper's Bank	
Boone State Bank	Boone, Neb.	First State Bank	Hoskins, Neb.	State Bank of Hoskins	Norfolk, Neb.	The American Bank	
Farmers State Bank	Bradish, Neb.	Farmers State Bank	Hume, Neb.	The Nebraska State Bank	North Bend, Neb.	Liberty State Bank	
Nebraska State Bank	Bridgeport, Neb.	First State Bank	Hordville, Neb.	Norman Exchange Bank	Norman, Neb.	Silver Creek State Bank	
Bridgeport Bank	Bridgeport, Neb.	The Bank of Howe	Howe, Neb.	First State Bank	North Bend, Neb.	Valley State Bank	
Union State Bank	Brownell, Neb.	The Howells State Bank	Howells, Neb.	Farmers State Bank	North Loup, Neb.	Bank of South Platte City	
Farmers and Merchants Bank	Bruna, Neb.	Bank of Otis & Murphy	Humphrey, Neb.	McDonald State Bank	North Platte, Neb.	Security State Bank	
Bruno State Bank	Bruno, Neb.	State Bank of Indianola	Indianola, Neb.	Platte Valley State Bank	North Platte, Neb.	Syracuse State Bank	
Farmers State Bank	Brunswick, Neb.	Inman State Bank	Inman, Neb.	The Oakdale Bank	Oakdale, Neb.	Farm Exchange Bank	
The American Bank	Burr, Neb.	Jackson State Bank	Jackson, Neb.	Oakland State Bank	Oakland, Neb.	Blue Valley State Bank	
Burton State Bank	Burton, Neb.	Home Bank of Lemoyne	Lemoyne, Neb.	Farmers State Bank	Ogallala, Neb.	Elkhorn Valley State Bank	
Citizens State Bank	Butte, Neb.	American State Bank	Kearney, Neb.	Nebraska State Bank	Ohiowa, Neb.	Farmers and Merchants Bank	
Cairo State Bank	Cairo, Neb.	Farmers State Bank	Kearney, Neb.	Commercial State Bank	Florence, Neb.	The First State Bank	
Farmers State Bank	Callaway, Neb.	Farmers State Bank	Kenesaw, Neb.	Bank of Bergen	Bennet, Neb.	Northern State Bank	
Chadron State Bank	Chadron, Neb.	Lemoyne State Bank	Kenesaw, Neb.	Farmers & Merchants Bank	Bennet, Neb.	Farmers State Bank	
Chappell State Bank	Chappell, Neb.	Farming and Merchants Bank	Kennard, Neb.	Security State Bank	Omaha, Neb.	W. Liberty State Bank	
Deuel County State Bank	Chappell, Neb.	Citizens Bank	Kennard, Neb.	The State Bank of Oconto	Oconto, Neb.	Farmers State Bank	
Bank of Cheney	Cheney, Neb.	Farmers State Bank	Kilgore, Neb.	Citizens State Bank	Ohiowa, Neb.	Citizens State Bank	
Clarkson State Bank	Clarkson, Neb.	The Farmers State Bank	Kramer, Neb.	Citizens State Bank	Orchard, Neb.	Farmers State Bank	
Farmers State Bank	Clarkson, Neb.	Lakeside State Bank	Lakeside, Neb.	Farmers State Bank	Osceola, Neb.	Citizens State Bank	
State Bank of Clearwater	Clearwater, Neb.	Lamont State Bank	Lamont, Neb.	Farmers State Bank	Osceola, Neb.	Security State Bank	
Bank of Cody	Cody, Neb.	Leigh State Bank	Leigh, Neb.	Overton State Bank	Overton, Neb.	American State Bank	
Hamilton State Bank	Columbus, Neb.	Farmers State Bank	Lewellen, Neb.	Farmers State Bank	Overton, Neb.	Farmers State Bank	
Columbus State Bank	Columbus, Neb.	Farmers State Bank	Liberty, Neb.	Bank of Otoe	Otoe, Neb.	Bank of Newman	
Farmers State Bank	Concord, Neb.	Continental State Bank	Lincoln, Neb.	Franklinton Valley Bank	Oxford, Neb.	Farmers Exchange Bank	
Farmers State Bank	Concord, Neb.	Farmers State Bank	Lincoln, Neb.	Farmers State Bank	Palmyra, Neb.	Liberty State Bank	
Cook State Bank	Cook, Neb.	Nebraska State Bank	Lincoln, Neb.	Bank of Panama	Panama, Neb.	Bank County State Bank	
Farmers Bank of Cook	Cook, Neb.					State Bank of Tilden	
Cortland State Bank	Cortland, Neb.					Farmers Exchange Bank	
Corsair State Bank	Corsair, Neb.					Farmers State Bank of Ulysses	
First State Bank	Crawford, Neb.					Bank of Ulysses	
Farmers State Bank	Creighton, Neb.					Merchants Bank	
The Security State Bank	Creighton, Neb.					Nebraska State Bank	
Citizens State Bank	Crofton, Neb.					Farmers State Bank	
Farmers State Bank	Crofton, Neb.					Tysango State Bank	
Curtis State Bank	Curtis, Neb.					Farmers State Bank	
Cushing State Bank	Cushing, Neb.					Farmers State Bank	
Dalton State Bank	Dalton, Neb.					East County Bank	
Farmers State Bank	Dalton, Neb.					Farm Home Bank	
Davenport State Bank	Davenport, Neb.					Farmers and Merchants Bank	
Bank State of Deshler	Deshler, Neb.					Security State Bank	
State Bank of Dewitt	Dewitt, Neb.					Farmers State Bank	
First State Bank	Dickens, Neb.					Waterbury State Bank	
Dixon State Bank	Dixon, Neb.					State Bank of Wauneta	
Dodge State Bank	Dodge, Neb.					Peoples Bank	
The Dunbar State Bank	Dunbar, Neb.					Wahoo Valley Bank	
The Bank of Eagle	Eagle, Neb.					Lancaster County Bank	
Farmers State Bank	Edgar, Neb.					State Bank of Wayne	
Farmers and Merchants Bank	Edison, Neb.					Wahoo State Bank	
Bank of Edison	Edison, Neb.					Farmers State Bank	
Culbertson Bank	Culbertson, Neb.					Security State Bank	
Elba State Bank	Elba, Neb.					Wood Lake State Bank	
Farmers State Bank	Elba, Neb.					Wood River State Bank	
Eldorado State Bank	Eldorado, Neb.					Wynot State Bank	
Elgin State Bank	Elgin, Neb.					Yutan State Bank	
Farmers Grain & Mercantile Bank	Elgin, Neb.					Peoples State Bank	
First Bank of Elk	Elk, Neb.					Farmers State Bank	
Farmers State Bank	Elkhorn, Neb.					Citizens State Bank	
Bank of Ellsworth	Ellsworth, Neb.					Wood Lake Bank	
American Exchange Bank	Elmwood, Neb.					Farmers and Merchants Bank	
						American State Bank	
						Farmers State Bank	

(Bell page in Omaha Be ... 27th to ... 1917 ...)

Exh. 21

(U. S. Sup. Court Rec., P. 2665)

(f) **The questionnaire circulated by the banks:**

This questionnaire printed and circulated by many of the banks constituted one of the most effective inducements to deposits. It was written by Mr. Stephens, chief witness in this case, and it so effectively meets the position of the banks in this case that we reproduce it on the following page in full. For the State Bank of Omaha the Chappell Printing Company printed one order of these questionnaires and the Hammond Printing Company printed four different orders, to-wit: December 4, 1925, 2,000; January 25, 1926, 2,000; July 7, 1926, 2,000; January 5, 1927, 2,000; (Rec., p. 336, Qs. 1952-6) and printed for the Fremont State Bank 10,000 (Rec., p. 336, Q. 1957). The Chappel Printing Company printed copies of the questionnaire for the Fremont State Bank and for other state banks and identified Exhibits I, J and K as some of those that were printed (Rec., p. 329, Qs. 1881-91).

These questionnaires contained on one page thereof a financial statement of the particular bank circulating it. The one here reproduced is the one circulated by the State Bank of Omaha.

It follows:

Nebraska Guarantee Fund

PROTECTING DEPOSITS
IN STATE BANKS

COMPLIMENTS OF THE

STATE BANK OF OMAHA

Omaha, Nebraska

The Largest State Bank in Nebraska

QUESTION: What is the object of this questionnaire on the subject of the Guaranty of Bank Deposits?

ANSWER: Its object is education. So many do not understand what it means, whom it protects, and who pays for the protection, that it seems timely and proper to set out the facts.

QUESTION: Do the State Banks pay for the cost of the protection given depositors under the Guaranty Law?

ANSWER: The State Banks pay the entire cost of the protection given to Depositors and because they do pay this heavy tax for the benefit of all, they feel they are entitled to have the people whom they protect know that they are protected and that the State Banks pay the entire cost of it.

QUESTION: Then what is the Nebraska Guarantee Fund Law?

ANSWER: It is a law creating in effect a gigantic insurance company composed of all of the State Banks of Nebraska for the purpose of insuring bank deposits.

QUESTION: Has the law been in effect long enough to prove its practical value to the state?

ANSWER: Yes, it has been in effect 16 years and during that time not a single depositor has lost a single dollar in a single State Bank in Nebraska.

QUESTION: Has there been a money panic or depression during that period?

ANSWER: Yes, from 1920 to 1923 was probably the greatest financial depression ever known in the history of this country.

QUESTION: Did this put a heavy strain on the Guarantee Fund?

ANSWER: Yes, but the Guarantee Fund proved capable of sustaining every strain that was put upon it and successfully met every emergency that arose during, before and since that distressing period?

QUESTION: Did the Guarantee Fund pay any losses to depositors during that period?

ANSWER: It certainly did. More than Eleven Million Dollars were paid to depositors in banks that were liquidated, who would have otherwise lost their money had there been no Guarantee Fund.

QUESTION: What is the condition of the Guarantee Fund at the present time?

ANSWER: The Guarantee Fund at the present time has more than Ten Million Dollars of resources, which are gradually being made available for the payment of losses and in addition to this large reserve it has the power to raise more than One and One-half Millions in assessments each year against the State Banks of Nebraska. These funds are ample to meet all possible losses that may occur.

QUESTION: How are the assessments made for maintaining the State Guarantee Fund?

ANSWER: The law authorizes the Secretary of the Department of Trade and Commerce to make an annual levy on the average deposits of the State Banks of not more than one-half of one per cent, plus, one-tenth of one per cent, which makes an aggregate assessment of six-tenths of one per cent on the average deposits of all the State Banks of Nebraska. The average deposits of State Banks at the last report amounted to nearly 290 million dollars.

(Ex. 29 of Ex. 13, P 267 Vol. 2 B. of Ev same 6th Ed as published
(Orig. U.S. Sup. Transcript Vol 2 Page 267)

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QUESTION: Is this method, then, similar to the processes of levying taxes on property for the payment of the running expenses of the Government?

ANSWER: It is.

QUESTION: Is it a fact, as often claimed, that the Guarantee Law protecting depositors in State Banks from loss, actually saved the State from financial disaster during the recent deflation period.

ANSWER: It is beyond question a fact, because Nebraska has recovered from the depression of that period with greater rapidity than has any other neighboring state, which has not had the benefit of a practical Guarantee of Deposits Law.

QUESTION: Do the depositors in State Banks have absolute confidence in the protection of their deposits?

ANSWER: They certainly do. There has never been a case of a run on a State Bank caused by uneasiness, misrepresentation or fear of the safety of their funds since the law was enacted in 1909. Depositors in State Banks do not withdraw their deposits from fear of loss, no matter what may be the condition of the Bank, for the reason that they know beyond question of doubt their deposits will be paid in full either by the Bank itself or by the State from the Guarantee Fund, in the event the bank is unable to do so.

QUESTION: Is it a fact, then, that when a depositor places his money in a State Bank, that all of the State Banks in Nebraska guarantee its return to him regardless of what may happen?

ANSWER: In effect that is exactly the situation. Nearly a thousand State Banks will be taxed by the State annually to the extent of six-tenths of one per cent on their average deposits until every dollar deposited in any failed bank is paid in full.

QUESTION: Can there be any greater security than this given to a depositor?

ANSWER: No better security is known to have yet been devised to protect a depositor from loss. It has survived 16 years including three years of the most depressed financial conditions ever known in the history of the country. It is safe to assume, therefore, that it will survive through the piping times of peace and prosperity that lie ahead of us.

QUESTION: How many State Banks are there in Nebraska?

ANSWER: Approximately 913.

QUESTION: How many National Banks are there?

ANSWER: Approximately 170.

QUESTION: Does the Guarantee Fund protect the depositors against loss in National Banks?

ANSWER: It does not. The state does not have control over National Banks. The law only applies to State Banks and deposits only are insured against loss in State Banks.

QUESTION: Are the National Bank depositors protected by a National Bank Guarantee Law?

ANSWER: They are not so protected. There is no such thing as a National Guarantee Law affecting National Banks.

QUESTION: Why has there not been enacted a National Guarantee Law protecting National Bank depositors?

ANSWER: Because National Bankers, as a rule, are opposed to the passage of such a law and Congress has not seen fit to overcome their opposition.

[illegible] accumulated by each State Banks with change of name and [illegible]

QUESTION: Why do they oppose it?

ANSWER: Because they do not wish to pay for the expense of maintaining it. It costs a great deal of money to insure the depositors against loss in banks. The State Banks in Nebraska have paid up to date over Eleven Million Dollars.

QUESTION: Does the Federal Reserve Act in any way protect depositors from loss in National Banks in case of failure?

ANSWER: It does not in the least. The Federal Reserve is a great credit reservoir for National Banks as going concerns and is of great service to the country. It mobilizes the reserves of National Banks and makes them available for credit so that National Banks can borrow money freely from it, thus enabling them to meet the demands of their customers in an emergency, but it does not pay depositors in case of loss or failure.

QUESTION: Do not National Bankers sometimes claim that it does?

ANSWER: Some may do so, but they do it through ignorance or in an attempt to mislead their customers. High class National Bankers make no such false claims, nor do they wish to profit through a misrepresentation of that kind.

QUESTION: Has the Federal Reserve Act strengthened sound banking among National Banks by exacting better practices?

ANSWER: It certainly has. It has made examinations of banks more rigid than formerly and has created higher ideals of banking than formerly existed.

QUESTION: Has the Guarantee Fund Law strengthened sound banking in the State Banks by exacting better practices?

ANSWER: It certainly has. As a result of banks being compelled to guarantee each other's losses in case of failure, they have demanded stricter and more rigid examinations and have insisted upon licenses to Bankers being issued only to men of high character and known integrity.

QUESTION: Then if the banking situation has been greatly strengthened by The Guarantee Fund Law and the Federal Reserve Act, is there any use of a Guarantee of Deposits Law any longer?

ANSWER There is as much use for a Guarantee of Deposits Law as there is for fire insurance. One can get along without either but he sleeps better for having them and in case of loss he is better able to go head with his business as a result of being able to have his money returned to him in full.

QUESTION: What effect has the Guarantee Law had on the prosperity of the state?

ANSWER: Without the Guarantee of Deposits Law, which has made possible the payment to the depositors of banks that have liquidated in Nebraska during the last sixteen years, their deposits in full, thousands of people would have been more or less impoverished through their losses, but this has been entirely avoided and absolute confidence maintained enabling the people to go on with their business without any financial disturbances whatever. When a merchant's store is destroyed by fire the insurance he carries enables him to immediately replace his stock and continue his business. When a bank fails anywhere in the State system all of the depositors are paid in full out of the Guarantee Fund with the result that the depositors continue their business without any interruption. The confidence of the people in their banks is maintained and their money is constantly flowing through the

banks for the purpose of carrying on the commerce of the state without any interruption. Industry is stimulated with the funds that are concorstantly available in the banks and the prosperity of the state has gone forward without let-up or hindrance in spite of the greatest price depression in all history. No surrounding state has prospered to the extent that Nebraska has. That has been the effect of the maintenance of public confidence in our financial institutions through the payment of depositors in full for every dollar they had on deposit in State Banks that were closed.

QUESTION: What is the financial situation now in Nebraska?

ANSWER: It was never sounder or better than at the present moment. Deposits in banks are increasing at a very rapid rate, indicating that the people are accumulating a surplus and gradually paying their debts. The banks never have been in such a sound position as they are now and there has never been a time when there was more available credit for business and industry than at the present.

QUESTION: What would have been the effect on the state if there had been no Guarantee of Deposits Law?

ANSWER: The effect would have been similar to that existing in one or two neighboring states, that cannot with propriety be mentioned, whose financial status is now in a state of chaos as a result of the lack of confidence due wholly to the fact that there is no insurance backing their financial institutions.

QUESTION: Does the law in Nebraska recognize State Banks as depositories for public funds?

ANSWER: It does. Every State Bank may be used as a depository for public funds for unlimited amounts without bonds of any kind.

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propriety be mentioned,
now in a state of chaos
of confidence due wholly
o insurance backing their

law in Nebraska recog-
itories for public funds?

Every State Bank may be
ublic funds for unlimited
of any kind.

QUESTION: Does the State law authorize National Banks as depositories without bonds?

ANSWER: It does not. A National Bank must give bonds for public funds held on deposit because its deposits are not insured, as they are in State Banks under the Guarantee Law.

QUESTION: Do National Bankers object to the Nebraska Guarantee Law?

ANSWER: Some of them do. Others recognize the great value of the law as a stabilizer of the financial situation in the state and heartily approve it. Those who do not have the broader view try to discredit the Guarantee Law so as to avoid its competition, notwithstanding the fact it has made Nebraska prosperous beyond that of any of its sister states not so protected. The solvent banks of the state have paid to depositors of failed banks more than Eleven Millions of Dollars in losses, which is a great sacrifice for them to make in the interests of the maintenance of the high honor and trust that banks deserve as depositories of the people.

QUESTION: Is this statement concerning National Banks a criticism?

ANSWER: It is not a criticism. Our National Banking System ranks with any system of banking known in the world. The only object of this educational program is to acquaint the people with the two kinds of commercial banks we have in this state, namely the State and National, and to make clear the fact that the Nebraska Guaranty Law protects only the Depositors in Nebraska State Banks and not in National Banks.

A STRONG BANK STATEMENT

ALBERT L. SCHANTZ, President
JOHN S. McGURK, Vice-President and Cashier
A. A. NELSON, Assistant Cashier
W. L. IDELL, Assistant Cashier

The State Bank of Omaha

Report of Condition at Close of Business Sept. 28, 1925

RESOURCES

Loans and Discounts	$4,502,678.71
Bonds	1,125,528.82
Real Estate	104,286.53
Furniture and Fixtures	30,000.00
Overdrafts	127.46
Cash	1,008,113.33
	$6,770,734.86

LIABILITIES

Capital Stock	$ 300,000.00
Surplus	130,000.00
Undivided Profits	39,048.70
Depositors Guarantee Fund	24,366.86
Bills Payable	None
Deposits	6,277,319.30
	$6,770,734.86

All Deposits in This Bank Are Protected by the Depositor's Guarantee Fund of the State of Nebraska

WE INVITE YOUR BUSINESS

THE LARGEST STATE BANK IN NEBRASKA

Safe Deposit Boxes $5.00 Per Year and Up

DIRECTORS

Albert L. Schantz — John S. McGurk
Oscar Keeling — D. C. Eldredge
Frank H. Gaines

(g) Other newspaper advertising in a typical county and the plight of its claimant depositors.

The undisputed situation in Dodge county, Nebraska, and surrounding territory affords a striking and unanswerable illustration of the main points that we are attempting to make by this brief. It is fairly typical of the conditions throughout Nebraska.

Dodge county had fourteen state banks, the outstanding one of course being the large and prosperous Fremont State Bank. In 1926, they all joined in THE OMAHA BEE advertising campaign. For many years past, under the leadership of the Fremont State Bank, they have advertised the Guarantee Fund and induced and procured deposits by the use of the means in this brief set forth. This advertising continued up until in the year 1928.

They participated in the advertising campaign in 1926 carried on in THE OMAHA BEE; they published in facsimile in THE FREMONT DAILY TRIBUNE in the latter part of 1926 ten of the page advertisements published in the OMAHA BEE. *At the bottom of each advertisement were the names of all the Dodge county state banks.*

They induced and persuaded deposits on their joint representations carried on over a long term of years.

Of the fourteen banks, four have now failed. After the exhaustion of all the assets claims against the Guarantee Fund will approximate $278,000 (Ex. 35, p. 589, Orig. Rec., omitted in printing).

The arguments used in the advertising campaign carried on are persuasive; we feel that while it burdens

this brief, it is of overwhelming importance that this court read it as indicating the means used to persuade and induce depositors, not only in Dodge county, but in other counties of the state. We have selected typical advertisements through the years to reproduce in this brief, commencing in 1923 and ending in 1928. They were published in THE FREMONT DAILY TRIBUNE which has a circulation of approximately 7,000 extending over Fremont, Dodge county, and the surrounding counties (Manager Hammond, Rec., p. 338). Mr. Hammond stated that he knew there was an average of four adult readers for each copy of the circulation (Rec., p. 350, Q. 2040).

The Fremont State Bank published February 2, 1923, an advertisement occupying three columns wide, full length of the page, headed "The Community Service" at the top, and "Fremont State Bank" at the bottom, and among other things stated (Rec., p. 340):

> "If you put your money in our savings department you will not only receive compound interest but *also have absolute insurance. One thousand state banks are assessed by law for the purpose of protecting your deposits.* You cannot lose a dollar in this bank by fire, flood, theft or failure.
>
> "Let us make this community prosper by placing our surplus funds in our own banks for the use of our own people. We do not expect to get all of the people's money into the Fremont State Bank, although we have paid $11,500 the last year for the purpose of insuring our depositors against possible loss. This is the measure of safety offered our depositors for the sake of inducing them to patronize home industry where safety and profits are greatest by leaving their money here for the use of the people who are making the community a fit place in which to live."

Later in the same year was an advertisement headed "Safety and Service" wherein the bank extolled its size and strength, and among other things stated (Rec., p. 342):

> "Notwithstanding this unparalleled solvency and ability to meet all demands, we have the added safety of having our depositors protected by the Guarantee Fund of the state of Nebraska. Approximately a thousand state banks are taxed not more than one and one-tenth per cent a year if need be on their deposits of 220 millions, for the purpose of paying depositors in full in the event of failure.
>
> "This Guarantee Fund now consists of more than two millions in cash and eight millions in assets, making a total of resources belonging to the Guarantee Fund of ten million dollars, available only for the security of depositors.
>
> "This vast sum is sufficient to pay all the depositors of fifty ordinary banks without collecting an additional dollar under the power of the state to levy a one and one-tenth per cent tax on deposits against the banks each year. *It is the largest insurance fund available to pay depositors anywhere and available for state banks only. National banks are not protected by this fund.*" (Italics are ours.)

In the same year (Rec., p. 344) there was the following advertisement two columns wide, headed "Safety First", and signed at the bottom "Fremont State Bank":

> "Today the bankers in Nebraska are meeting in the various districts to choose a body of men from which the governor will select the personnel of the Nebraska Guarantee Fund Commission. This action will conclude the preliminary steps in perfecting the Guarantee of Deposits Law which has rendered the people of Nebraska a tremendous service during the recent money stringency when business failures were re-

ported daily by the hundreds and banks failed here and there, our depositors were undisturbed *because their money in our state banks was insured and could not be lost.* The test of a great disaster proved it.

"*In brief, a practical, workable, mutual insurance company has been perfected that absolutely protects the money of the people when placed in the state banks of Nebraska.* It builds confidence, relieves the depositor and his family from worry over the safety of the nest egg they are adding to, bit by bit, for the building of a home of their own, and it will encourage the wary to bring their money out of hiding and put it to work. It develops faith in industry and inspires the farmer and business man to bigger enterprises. It will maintain prosperity.

"*Everybody appreciates the advantage of insurance in other fields as a safeguard of the people's wealth but never before has the public in any state, through a safe, sane and practical law tested by years of hard knocks, been afforded the advantage of safe insurance where their money is concerned.*

"We are proud to be a part of this beneficial plan and are glad that we can offer the people of Fremont through our bank the protection the Nebraska Guarantee Fund affords.

"Both our savings and checking accounts are included under this act, and their safety is given to you as a part of our service.

"*Remember that every dollar you deposit in this bank has in effect a dollar's worth of insurance backed by practically a thousand other banks.* Nebraska has a wonderful banking system. It has no equal in all the states. It is better today than ever after a two-year deflation period when financial disaster overtook

large numbers of people, but not a single dollar was lost by a depositor in a state bank.

"FREMONT STATE BANK

"Deposits protected by the Depositors Guarantee Fund of the State of Nebraska.
"DAN V. STEPHENS, *President*."

(Names of other officers also attached.)
(Italics are ours.)

Other advertisements were identified in the immediately succeeding pages of the record.

On December 31, 1923, an advertisement four columns wide and the full length of the page appeared, headed with the words: "Rest in Security", and signed by The Fremont State Bank by Dan V. Stephens, president, in which the following paragraph appeared (Rec., p. 347):

> "The second protection is that offered by the Guarantee Fund of the State of Nebraska to the depositors of this bank. The state of Nebraska collects assessments from all of the state banks of Nebraska, which assessment is used to pay depositors, who lose their deposits through state bank failures. In the thirteen years that this law has been in effect, not a single depositor in a single bank in the state of Nebraska has lost one penny of the money he had on deposit in a bank that failed. *Therefore, this insurance, carried by this bank at a very great expense, protects absolutely every dollar that is carried on deposit in this bank from loss. No greater protection for depositors can be offered than this.*" (Italics are ours.)

On Saturday, November 7, 1925, four-fifths of a page of THE FREMONT TRIBUNE contained in large letters the questionnaire herein elsewhere set forth headed with a heading across the page "The Nebraska Guarantee Law

N 1 [illegible]

N 2 [illegible] Bank

N 3 "A Message of Strength"

N 4 "65,000 Years of Labor"

N 5 "No Mattress Banks in Nebraska"

N 6 "Giving Up Profits to Support a Principle"

N 7 "All Work Together in Nebraska"

N 8 "Strong Banks Make Strong States"

N 9 "In Nebraska the Guarantee Works Both Ways"

N 10 "It Has Been a Wonderful Story".

Mr. Stephens prepared the questionnaire, Exhibit D, about November 7, 1925, and the Fremont State Bank circulated 5,000 copies of it; he prepared the circular

PX 62 P. p. 496, vol. III, Orig. Rec., also Ex. 39, p. 38, vol. II, Orig. Rec.) in 1926, entitled "The Bank Guarantee Law Challenged and a Red Hot Answer by a Nebraska Banker" (Rec., p. 317). In 1923 Mr. Stephens was a member of the legislative committee of the State Bankers Association which presented the Guarantee Fund Commission Act to the legislature and secured the passage of the bill with but minor amendments (Rec., p. 318, Qs. 17247).

Pages 418 and 419, vol. III, Orig. Rec., is facsimile of two of the ten page advertisements run by the Dodge County Banks in THE FREMONT EVENING TRIBUNE, generally similar in size and appearance to the entire ten run as a part of THE BEE series. As Ex. P. p. 474, Vol. III, and Ex. 50, p. 727, Vol. IV, Orig. Rec., are two letters of Dan V. Stephens, published January, 1928, *in full* pages of THE FREMONT EVENING TRIBUNE, which state the condition of the depositors in the banks graphically; they were published in the same year of the filing of this case and at a time when Mr. Stephens knew all the facts as to the Guarantee Fund and the respective obligations of the banks to the depositors as well as he did when in the same year he caused this suit to be filed. They are quoted from hereinafter.

(h) Resolution of Meeting of State Bankers.

In August, 1926, at a meeting of bankers in Omaha at which representatives were present from each county the following resolution was adopted and received publicity (Rec., p. 416, Q. 24924):

> "We re-affirm our strict adherence to the Guarantee Fund Law, under which no depositor in any

> Nebraska bank has suffered loss. We are opposed to any change in the law which will in any wise tend to obstruct, hinder or delay any depositor in Nebraska."

---

(1) Pamphlet "The Bank Guarantee Law Challenged and a Red Hot Answer by a Nebraska Banker."

One of the most effective pamphlets issued and circulated was one entitled "The Bank Guarantee Law Challenged and Red Hot Answer by Nebraska Banker" (Ex. 30 of Ex. 13, p. 268, Vol. II, and Ex. F, p. 406, Vol. III, Orig. Rec., omitted from the printed record).

Among other banks the State Bank of Omaha circulated the pamphlet. There were about 2,000 of these distributed by it over the customers' counters to customers with a printed endorsement on the back "With the Compliments of the State Bank of Omaha, the Largest State Bank in Nebraska" (Rec., p. 228, Qs. 1170-6).

This pamphlet was an answer to an article by one R. B. Clark of North Carolina appearing in the Bankers Association Journal. This article was printed and circulated in April, 1925. It is so typical of the propaganda and representation of the state bankers as testified to and as shown by other exhibits herein that we quote some typical paragraphs from its eight pages.

Taking up Mr. Clark's statements, he was answered in the pamphlet:

> "FOURTH, his statement, 'that to compare guarantee of deposit laws with legitimate insurance is without reason and absurd,' is not in harmony with

the thousands of mutual insurance organizations, that have been conducted successfully throughout the country and that are now carrying uncounted millions of risk on the property of the people and paying their losses promptly. *The state banks of Nebraska are bound together into a mutual insurance company carrying their own risks and paying their own losses.* There is nothing about this that is unreasonable or absurd. It is Mr. Clark's position that is absurd." (Italics are ours.)

"FIFTH, his statement, 'that it jeopardizes the solvency of all banks and the safety of all depositors for the theoretical safety of a few,' is not supported by the facts because the Guarantee Law has not assessed the banks of Nebraska at a higher rate even in the peak of our losses during the period following the war than the ordinary bonding companies charge for the protection of special favored depositors in these banks. Mr. Clark's idea seems to be that it is absurd to insure the deposits of an ordinary citizen but perfectly proper to insure the deposits through a bonding company of favored depositors, who will not trust banks without this insurance. Prior to the war and during the long period of peace and prosperity the assessments of the banks of Nebraska amounted to one-fifth of one per cent on their deposits. Bonding companies charge ordinarily one-half of one per cent for the same protection and banks other than state banks in Nebraska are constantly insuring their special depositors, such as insurance companies, cities, counties and states while at the same time making hypocritical speeches against guaranteeing the deposits of the ordinary citizen.

"SEVENTH, * * * * In Nebraska, instead of there being applications for state banks to nationalize, there have been scores of applications from national banks to take out state charters during the last two years and so far as we have any record, there has been only one application for a national charter made

since the deflation period began and we have every reason to believe that other reasons than the Guarantee Law caused the change.

"EIGHTH, his statement, 'that guarantee schemes always have been, are and always will be impotent, futile and disastrous,' is disproven by the experience of tens of thousands of mutual insurance companies and by Nebraska's own experience as a state with a guarantee of bank deposits that has been successfully administered and is entirely satisfactory to the state banks of Nebraska, as proven by the fact that they have not taken out national charters and that there are no applications pending, that I have ever heard of, or of one of them desiring to do so, excepting as above indicated.

"TENTH, his statement, 'that well paid, intelligent, competent supervision will afford all the guarantee the depositing public is entitled to, as compared with all other human affairs,' is not supported by any facts at all, because all other human affairs are supported by insurance of every kind and character and it is only the depositors in banks that are not, generally speaking, insured. Good bankers everywhere, refuse to carry the risks of men who will not support their business solvency by insurance. It is the rankest inconsistency to apply the principle of insurance to everything that a banker does for himself and in the same breath refuse to protect the depositors who do business with him. It is not only inconsistent but it smacks of unfairness and dishonesty.

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15. Growth of banks and benefits received from 1911 to 1928 (to time of suit).

The Department of Trade and Commerce (Banking Department) produced on request of defendants and Intervener, Stebbins, in compiled form a printed and statistical abstract of data as to all the banks from 1911 to 1928, a

period of eighteen years. This showed the growth of the banks through the period and is reproduced on the next page, being Exhibit 10, Rec., p. 422.

This abstract shows that the deposits in state banks increased three and one-half times, from approximately seventy-four million dollars in 1911 to two hundred fifty-two million dollars at the end of 1928. This amount at the end of 1928 did not take into account thirteen million dollars then on deposit in the Commission-operated banks which would increase the total accordingly. While a slight diminution of deposits is shown by this statement commencing with December 31, 1926, it is explained by the separating of the deposits in the Commission-operated banks. With these added there has been, except for two years, a consistent increase for the eighteen years operation of the Guarantee Fund Law.

The 669 banks in December, 1911 (effective beginning of Guarantee Law), had surplus and undivided profits of $4,306,768. The 726 banks on December 31, 1928, had surplus and undivided profits of $8,975,755, having doubled. This increase was after paying all assessments to the Guarantee Fund and dividends to stockholders and charging-off against the earnings the shrinkage in value of assets during the deflation period.

There was an increase in the number of banks and then a decrease but neither the increase nor the decrease operated to affect the steady growth of deposits through the period, with the exceptions stated. The reduction in number of banks was partly attributable to seventy-one consolidations that have taken place (Rec., p. 405, Q. 2422).

(a) **Tabular departmental compilation by years for the period, Exhibit 10, as follows:**

STATE OF NEBRASKA

DEPARTMENT OF TRADE AND COMMERCE

BUREAU OF BANKING

LINCOLN

Report of Last Call Reports for the Years 1911 to 1928, Inclusive

Date	No. of Banks	Capital Stock	Surplus	Net Undivided Profits	Total Deposits	Other Real Estate Owned	Total Dividends paid to Stockholders	Total Assessments paid by Stockholders	Total losses charged off annually from sources other than assessments on Stockholders
Dec. 5 1911	669	$12,827,240.00	$2,582,299.39	$1,724,469.27	$73,886,047.05	$211,001.87	Figures below were compiled from Special Report on 618 Banks		
Nov. 26 1912	695	$13,833,500.00	$2,950,844.20	$1,818,039.69	$82,454,163.90	$286,747.70	.....	.....	.....
Oct. 31 1913	695	$14,455,100.00	$3,295,242.03	$1,729,459.69	$91,738,896.74	$352,434.21	.....	.....	.....
Oct. 31 1914	719	$15,798,100.00	$3,807,242.84	$1,857,808.81	$93,490,843.95	$428,572.39	.....	.....	.....
Dec. 9 1915	762	$17,118,600.00	$4,170,852.50	$2,234,466.71	$114,470,498.08	$534,475.15	.....	.....	.....
Nov. 17 1916	809	$18,461,300.00	$4,713,018.46	$2,628,597.09	$165,507,506.95	$580,817.25	.....	.....	.....
Nov. 20 1917	842	$21,056,300.00	$5,383,109.58	$2,925,914.11	$223,469,644.05	$622,791.64	.....	.....	.....
Nov. 1 1918	928	$22,210,800.00	$6,266,807.29	$2,924,063.97	$240,264,131.65	$606,585.88	.....	.....	.....
Nov. 15 1919	937	$24,881,800.00	$7,400,255.30	$3,797,555.21	$276,429,320.93	$641,450.88	.....	.....	.....
Nov. 13 1920	1012	$26,349,700.00	$8,174,341.33	$3,742,631.54	$256,839,662.43	$818,514.10	$1,545,533.48	$6,044.01	$366,109.35
Dec. 31 1921	1010	$25,699,800.00	$7,954,163.56	$1,051,998.12	$204,886,633.74	$1,541,575.78	$968,586.70	$175,961.24	$719,205.29
Dec. 30 1922	986	$24,754,700.00	$7,449,463.40	$1,040,086.91	$238,542,626.29	$3,514,291.12	$680,064.90	$258,378.24	$852,400.02
Dec. 31 1923	938	$24,300,700.00	$7,070,117.31	$1,512,383.19	$242,965,383.55	$6,217,645.03	$591,140.06	$225,435.75	$901,517.17
Dec. 31 1924	928	$24,108,700.00	$7,062,881.44	$1,643,161.24	$271,477,988.34	$9,101,185.36	$738,743.31	$220,056.51	$913,874.84
Dec. 31 1925	872	$22,482,700.00	$6,736,397.92	$1,154,274.37	$272,367,328.23	$10,794,120.19	$877,260.41	$404,738.29	$986,751.39
Dec. 31 1926	839	$21,866,500.00	$6,586,830.84	$1,911,250.03	$265,430,844.71	$11,588,295.72	$857,416.08	$164,843.27	$1,093,116.13
Dec. 31 1927	793	$20,648,500.00	$6,327,996.66	$2,077,474.40	$261,311,586.83	$11,494,098.79	$866,470.43	$196,458.12	$1,356,931.72
Dec. 31 1928	726	$19,001,000.00	$6,075,741.87	$2,900,014.22	$252,375,577.95	$9,872,647.21	$629,556.30	$454,766.72	$1,158,042.49
						Totals	$7,754,771.67	$2,106,682.15	$8,347,948.40

The banks listed below for 1925, 1926 and 1927 were operated by the Guarantee Fund Commission as going concerns and are not included in figures above.

				†Profit Account Overdrawn		
Dec. 31 1925	31	$855,000.00	$149,605.85	$588,783.68	$9,158,019.28	$1,424,474.21
Dec. 31 1926	44	$1,182,700.00	$178,698.60	$1,402,849.12	$10,086,352.49	$2,087,597.89
Dec. 31 1927	62	$1,615,700.00	$216,942.01	$1,673,699.17	$13,150,075.19	$2,366,971.50

†Represents losses and expenses paid in excess of earnings.

(Ex 10, P581. U2 B of Ev.)

(U.S. Sup. Court Rec. P. 422)

STATE OF NEBRASKA

DEPARTMENT OF TRADE AND COMMERCE

BUREAU OF BANKING

LINCOLN

port of Last Call Reports for the Years 1911 to 1928, Inclusive

Surplus	Net Undivided Profits	Total Deposits	Other Real Estate Owned	Total Dividends paid to Stockholders	Total Assessments paid by Stockholders	Total losses charged off annually from sources other than assessments on Stockholders	Statistics Relating to Depositors Guarantee Fund: Total levies paid to Guarantee Fund	Total Refunds to Guarantee Fund	Total Drafts against Guarantee Fund
,582,299.39	$1,724,469.27	$73,886,047.05	$211,001.37	Figures below were compiled from Special Report of 618 Banks			$176,863.36		
,950,844.20	$1,818,039.69	$82,454,163.90	$286,747.70				$406,858.07		
,295,242.03	$1,729,459.69	$91,738,896.74	$352,434.21				$271,806.68		
,807,242.84	$1,857,808.81	$93,490,843.95	$428,572.39				$140,647.34		$54,526.17
,170,852.50	$2,234,466.71	$114,470,498.08	$534,475.15				$144,684.92		
,713,018.46	$2,628,597.09	$165,507,506.95	$580,817.25				$421,471.81		$79,051.81
,383,109.58	$2,925,914.11	$223,469,644.05	$622,791.64				$219,904.49		
,266,807.29	$2,924,063.97	$240,264,131.65	$606,585.88				$318,028.79	$23,715.55	
,400,255.30	$3,797,555.21	$276,429,320.93	$641,450.88				$802,476.74		
,174,341.33	$3,742,631.54	$256,839,662.43	$818,514.10	$1,545,533.48	$6,044.01	$366,109.35	$639,243.93		$737,709.25
,954,163.56	$1,051,998.12	$204,886,633.74	$1,541,575.78	$968,586.70	$175,961.24	$719,205.29	$2,317,807.70	$35,550.09	$2,697,222.35
,449,463.40	$1,040,086.91	$238,542,626.29	$3,514,291.12	$680,064.90	$258,378.24	$852,400.02	$1,971,579.92	$370,927.42	$2,172,765.40
,070,117.31	$1,512,383.19	$242,965,383.55	$6,217,645.03	$591,140.06	$225,435.75	$901,517.17	$2,046,320.39	$182,658.71	$2,061,961.62
,062,881.44	$1,643,161.24	$271,477,988.34	$9,101,185.36	$738,743.31	$220,056.51	$913,874.84	$1,004,860.01	$193,286.78	$1,010,025.65
,736,397.92	$1,154,274.37	$272,367,328.23	$10,794,120.19	$877,260.41	$404,738.29	$986,751.39	$1,616,329.85	$533,700.11	$3,586,093.35
,586,830.84	$1,911,250.03	$265,430,844.71	$11,588,295.72	$857,416.08	$164,843.27	$1,093,116.13	$1,672,338.75	$427,282.82	$2,625,757.27
,327,996.66	$2,077,474.40	$261,311,586.83	$11,494,098.79	$866,470.43	$196,458.12	$1,356,931.72	$1,653,206.76	$157,219.92	$2,270,436.26
,075,741.87	$2,900,014.22	$252,375,577.95	$9,872,647.21	$629,556.30	$454,766.72	$1,158,042.49	$885,412.60	$257,716.76	$1,256,909.74
			Totals	$7,754,771.67	$2,106,682.15	$8,347,948.40	$16,709,842.11	$2,182,058.16	$18,552,458.87

and 1927 were operated by the Guarantee
and are not included in figures above.

	†Profit Account Overdrawn		
$149,605.85	$588,783.68	$9,158,019.28	$1,424,474.21
$178,698.60	$1,402,849.12	$10,086,352.49	$2,087,597.89
$216,942.01	$1,673,699.17	$13,150,075.19	$2,366,971.50

in excess of earnings.

(U2 B of Ev.)

(Current Rec. P. 422)

(b) Increased Deposits.—$100,000,000 of deposits carrying annual earnings of $2,000,000 to $4,000,000 are attributed solely to the Guarantee Fund.

While the Guarantee Fund is by its terms primarily *for the protection of depositors in state banks* specific and large benefits to the banks were disclosed by the evidence aside from the general benefits to the public. It was authoritatively testified to and undisputed that $100,000,000 of deposits, carrying an annual earning of $2,000,000 to $4,000,000 to the banks, were solely attributable to the Guarantee Fund.

Mr. George W. Woods, then a banker of Lincoln and a wholly disinterested and highly qualified witness, testified in detail and convincingly as to the large benefit to the banks by way of increased deposits and otherwise; and later testified in detail and from his intimate knowledge as to the causes of failures and heavy losses and charge-offs to the banks. This latter testimony will be quoted later, but at this point it is well that we refer to the qualifications of Mr. Woods before here and also later quoting him.

Mr. Woods had lived in Lincoln thirty years; had been an officer of both state and national banks; was secretary of the Lincoln Clearing House Association and had been for twelve years (Rec., p. 281, Qs. 1459-61); at the time of the trial was the cashier of the Lincoln State National Bank and Trust Company; prior to that he had been cashier of the Lincoln State Bank, which bank had on deposit money of the various country banks, and was their city correspondent; he was familiar with banking conditions generally in Nebraska (Rec., p. 241, Q. 1239). From 1901 to 1917 he was a representative of R. G. Dun

& Co. (Rec., pp. 238-9, Qs. 1225-7). Being city correspondent for the country banks meant that the country banks carried a portion of their reserve with his bank in the form of deposits and from time to time the banks would borrow money from it. Such connection had brought him in very close and confidential connection with these correspondent banks and he would call on them and go through their note cases and familiarize himself with their profits and losses, charge-offs, expenses, etc. (Rec., p. 239, Qs. 1228-30).

He had been on the legislative committee of the Nebraska Bankers' Association for ten years, and had served on the council of the Association which was equivalent to the board of directors and which determined the general policies of the State Association (Rec., p. 239, Qs. 1231 to 1235). As a member of the legislative committee for the ten years preceding, he with the other members had drawn the bills enacted into laws which provided for the present Guarantee Fund Commission, the reduction of the maximum assessments on state banks from 1.1 per cent per annum to .6 per cent per annum, the licensing of state bankers and discretionary powers in the banking department in granting charters (Rec., p. 240, Q. 1237).

As to his service on the Agricultural Loan Association he further testified that as a member of the Association he dealt with failed banks in practically the same manner as the Guarantee Fund dealt with them, issuing receiver's certificates which were endorsed and guaranteed by the Association and that in fact the only difference between what the Association did and what has been done since by the Guarantee Fund Commission was that under the latter the proceedings were legalized by law, while the former was more or less voluntary (Rec., p. 240, Q. 1238).

Testifying as to growth of deposits and earnings Mr. Woods said (Rec., p. 247):

Q. 1265. "Now, Mr. Woods, you state that the Bank Guarantee Law had an influence on deposits; in your opinion what effect, if any, has the Guarantee Fund Law and its operation had on the amount of money deposited in state banks? From 1910 up to July 1, 1928?"

A. "It is no exaggeration to say it has accounted for at least one hundred million dollars deposited in the state banks of Nebraska which would not otherwise have been made except for the Bank Guarantee Law. I do not think there is any exaggeration in that statement at all."

Q. 1312. "Now, Mr. Woods, when you stated that in your opinion the Guarantee Law had added a hundred millions to deposits in state banks, did you mean that otherwise those deposits would have been in national banks or in building and loan companies?"

A. "Yes, and other investments; they would have been either in national banks, or building and loans or stocks."

And in answer to question (Q. 1318, p. 257, Rec.), he said:

* * * * "I have made studies of the increase of deposits in state banks, perfectly marvelous growth, in places where there were splendid state banks, Hastings for example, and I have studied the general trend of the national banks in denationalizing, in going over to the state banks where of course they could benefit by that, and I have also made studies of the individual deposits in state banks in Nebraska where from first hand knowledge I know that excessively large deposits were made in lieu of other investments because more confidence was felt; they were

considered just as good as government bonds and paid more interest. This is taking all the comparisons I have made up to a year ago, I couldn't say the exact date because this has been true generally under the law."

He testified further (Rec., pp. 276-7):

Q. 1434. "Would you be able to make an estimate as to the amount of profit that has accrued to the banks from such additional deposits which you estimated at one hundred millions of dollars over the period?"

A. "I have made no calculation; that runs into very large figures; if my assumption is correct it runs into very large figures, the total. I would have to do quite a little figuring. I couldn't answer that off hand, what that amounts to."

Q. 1438. "Under normal conditions before the inflation period and under the operation of the Guarantee Law and taking normal banks and then basing it on capital stock, plus surplus what would you say would be the average that such banks made on their deposits?"

A. "On their deposits?"

A. "I would say from 2 per cent to 4 per cent on the deposits."

Q. 143. "You were speaking annually?"

A. "Yes, annually. Some made more than 4 per cent but that would be conservative for the average."

Mr. Woods' testimony that state banks had gained 100 million dollars in deposits on account of the Guarantee Law and the average they made on such deposits was not disputed, and the cross-examination of him emphasized the sound basis for his statements. Among other things, he noted the rapid growth in the number of state banks, the

conversion of national banks into state banks, and the steady increase in deposits of state banks (Rec., p. 282, Q. 1471).

Testifying as to the competition for deposits Mr. Woods said (Rec., p. 247):

> Q. 1266. "Now what effect, within your knowledge, has the Guarantee Fund Law had on the competition for deposits between national banks and state banks from 1910 to July 1, 1928?"
>
> Q. 1267. "Just generally?"
>
> A. "I know from first hand knowledge that depositors who have changed their location to other places and made inquiry with regard to banks have met the banker with this question, 'Are deposits in this bank guaranteed by the state of Nebraska?' and if they were told 'No' that particular bank didn't get the deposit. That has been commonplace in the last six or seven years all over Nebraska."

Mr. Woods added (Rec., p. 282, Q. 1472):

> " * * * * * in the larger cities the national banks continued to grow and on the whole made a very satisfactory growth right along, notwithstanding the Guarantee Fund Law. In the smaller towns, towns below the size of Fremont, Grand Island, Hastings, Beatrice and towns of that size, for the most part the state banks had a very material advantage and have made the larger growth in deposits."

(c) Public funds were demanded by the banks and received for deposit by every state bank in Nebraska without bond on the "Security of the Guarantee Fund" under an option in the law to do this or to give bond and avoid assessment on such deposit of public money.

There are two million dollars of state, county, school district, township, city, village and other public funds in failed state banks (Rec., p. 426, Ex. 36).

The Governor on behalf of the State and its municipal subdivisions and the State Treasurer in his own behalf each pleaded the rights of the State and its governmental subdivisions based on these public deposits as against the Guarantee Fund and plaintiff banks.

The Guarantee Fund law gives the State Banks the option to demand public funds as "secured by it" without giving bonds, or in lieu thereof, to "otherwise secure public deposits" and such deposits would thereupon be exempt from levies for the Guarantee Fund (Secs. 8027, 8025, Compiled Statutes, Nebr. 1922). The state banks of Nebraska for seventeen years have elected to demand and receive the public funds under the "security" of the Guarantee Fund instead of giving bonds.

In 1911, concurrently with the decision of this court holding the Nebraska Guarantee Fund law valid, the Legislature of Nebraska amended the law (Session Laws, 1911, p. 84) by adding the following *proviso* (Comp. Stat. of Nebr. 1922, Section 8027):

> "Provided further, that no bank which has complied in full with all of the provisions of this act shall be required to give any further security or bond for the purpose of becoming a depository for any public funds, but depositary funds shall be secured *in the same manner that private funds are secured.*" (Italics are ours.)

Another section of the law (Section 8025, Comp. Stat. of 1922), exempted "public money otherwise secured" from

assessment. So a bank thus had the option to demand deposits "under the security of the Guarantee Fund Act" or "otherwise secure them."

Every state bank in Nebraska had public deposits at the time of the institution of this suit save one and it had but recently had them (Rec., p. 456, Qs. 2738-4). Witness Bliss, Secretary of the Banking Department, testified that prior to the institution of this suit and notice of the fact that it was to be instituted, the banks of the state were not giving bonds for public deposits so far as his information went and the records of the department disclosed (Rec., p. 456, Q. 2742). Isolated instances of banks recently giving bonds appeared; but no bank was cited that had not availed itself of the right to demand public deposits on the security of the Guarantee Fund.

The Abie State Bank had county deposits continuously from 1912 down to July, 1928, without giving any bonds therefor (Rec., p. 184, Qs. 838-9). About the time of the commencement of this suit it had given bond (Rec., p. 186, Q. 859).

After public notice that this suit was to be filed the State Treasurer commenced to demand bonds (State Treasurer Stebbins', Supp. Rec., p. 57); as did some other officials; though under the Guarantee Fund Law such bonds could not be demanded.

Witness Shantz's State Bank of Omaha had state, city and county money, and for fifteen years gave no bond for any public moneys (Rec., p. 226, Q. 1156). Witness Stephens' Fremont State Bank had some public funds for years without giving depository bonds and had been giving security for about a year before the trial (Rec., p. 313, Qs. 1726-32).

Willis M. Stebbins, state treasurer and intervener, has occupied that office since January, 1927; all his deposits had been made on the faith of the Guarantee Fund protection. (Mr. Stebbins, Supp. Rec., p. 64). He had adjudicated claims against the Guaranty Fund for $104,561 (Orig. Rec., p. 702, omitted in printing).

The 726 banks in Nebraska had state treasurer deposits of $984,399.59, county deposits of $10,230,619.10, and city deposits of $2,739,695.96, making a total of $13,954,514.55 (Exhibit 38, Rec., p. 437; reproduced in this brief). These figures do not include other public deposits.

(d) The surety company rates to national and state banks on depository bonds (thus avoided by state banks) were higher than the Guarantee Fund assessments.

The banks demanding and receiving public funds for deposit without giving bonds paid less to the Guarantee Fund with reference to said deposits, than they would have had to pay for bonding premiums to surety companies, had they given bond. For at least six years prior to the trial the surety company rate on bank bonds for public deposits had been unchanged and had been uniform over the state and varied from one-half of one per cent to one per cent on deposits, depending on the capital of the bank. The average annual rate was seven-tenths of one per cent or $7.10 per thousand dollars of deposits as against the maximum aggregate general and special Guarantee Fund assessments of six-tenths of one per cent or $6 per thousand dollars of deposits. The Surety Company rate on national banks was the same as on state banks. (Rec., pp. 496-7.)

The national banks thus pay an average of $7.10 a thousand to a bonding company to insure public funds. They also pay interest as do the state banks. As between paying $7.10 a thousand to a bonding company and $6.00 a thousand to a Guarantee Fund on public funds, the balance is in favor of the Guarantee Fund aside from all other benefits attached to the Guarantee Fund. The Guarantee Fund, incidentally, puts all depositors, both public and private, on the same plane with public deposits in the matter of security; and at less percentage of cost than surety bond protection.

We submit, that if the banks can pay $7.10 per thousand dollars of deposits to bonding companies for bonds insuring public deposits, on all of which deposits they are also paying interest, it is reasonable to pay $6.00 a thousand dollars to a Guarantee Fund to insure and put all depositors on the same basis when as to a substantial share of such private depositors they pay no interest.

The statute exempting state banks from giving bonds for public deposits provides that such depository funds shall be thus "secured in the same manner that private funds are secured" (Sec. 8027, Comp. St., 1922). That is, by the Guarantee Fund.

The "security of the Guarantee Fund" was the obligation of the going banks to contribute a maximum of $6.00 per thousand of deposits annually to a fund to pay public deposits and others in those of their number that failed. Such was the contemplated and actual operation of the law; otherwise there would be no security; there was no necessity for security except as applied to a bank that failed. The banks state and reiterate that the Depos-

itors Guarantee Fund is for the protection of deposits in going banks, a most fallacious statement. There could be no matured liability ever except to those depositors in banks that fail.

These public deposits were made in the state banks of Nebraska under the foregoing law and under all the representations in this brief set forth and while the law was admittedly constitutional and valid and operative. Appellants now assert no equitable or appealing reason why a court of equity should cancel their obligation to contribute $6 per thousand dollars of deposits to the Guarantee Fund to apply on the claims arising as aforesaid.

(e) State banks under the Guarantee Law are given twice the loan limit available to national banks; state banks carry their reserves in other banks at interest while national banks are required to carry funds in federal reserve banks without interest; under the law existing state banks have a practical monopoly in towns they serve; each of these facts adds to the value of a state charter.

The loan limit of national banks to one customer is 10 per cent of the bank's capital as provided by federal law (Sec. 84, Ch. 2, Title 12, U. S. C. A.). They are required to carry 3% of time deposits and 7% of demand deposits in Federal Reserve Banks without interest. (Secs. 461, 462, Ch. 3, Title 12, U. S. C. A.).

On the other hand under the Nebraska Guarantee Fund Act the loan limit of state banks to one customer is 20 per cent of the bank's capital (Session Laws of Nebraska,

1923, Sec. 45, Ch. 191). Thus a state bank can loan twice as much to one customer as a national bank with the same capital, enabling a state bank to do business on less capital investment.

There is no requirement of a state bank to be a member of or carry any balance in the Federal Reserve Banks so the state banks carry their reserve at interest in Reserve cities.

Again under existing law, a state bank charter amounts to a state bank monopoly in almost every community in view of statutory power vested in the banking department to deny charters except upon proof of public necessity (Sec. 7990, Comp. St., 1922).

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16. The cause of failures and heavy losses in going banks. From 1920 to 1927 there were a large number of bank failures and losses to going banks through gradual liquidation by banks of previously acquired loans and after shrinkage of values.

17. By the maximum exploitation and featuring of the Guarantee Fund during this liquidation period there were large benefits to the banks, the banking situation was stabilized, and many of the present strongest banks were able to survive.

The banks as a whole through the entire operative period of the Guarantee Fund Law have each year made large earnings. However, the net earnings during recent years have been materially affected by losses developing because of loans made during the period of high prices prior to 1920, and the depreciation of securities following.

These loans were in a greater or less degree in all banks. The losses as arising through the years following have been absorbed by earnings, generally in this brief designated as "charge-offs". The banks have been applying their earnings to the extent necessary to liquidate these developing losses, which to that extent reduced their net earnings and dividends. The stabilizing influence of the Guarantee Fund made possible this gradual absorption.

This absorption was retarded to some extent in 1925 and 1926 by a partial state crop failure in 1925 and a similar condition over a large part of southern Nebraska in 1926 (Rec., p. 653, Qs. 4239-40).

Mr. Woods, whose high qualifications have been hereinbefore referred to, and a disinterested witness, graphically outlined the conditions producing the losses and the influence of the Guarantee Fund in permitting their absorption.

Mr. Woods, referring to the banking conditions in Nebraska from 1910 down to July 1, 1928, testified (Rec., p. 211, Q. 1240 *et seq.*):

That from his knowledge and experience he was able to state the general banking conditions from 1910 down to July 1, 1928; that he knew the cause of bank failures generally, the amount, the general extent, and the cause of charge-offs by banks during that period; that he knew the financial condition of the banks of the state during the period and the reasons for the conditions that existed; that during the period from 1910 to 1920, prices increased and all banks made money; that loans were made on equities and on basis of character and the giving of banking credit generally was ex-

cessive; that in 1920 livestock and grain prices dropped which very quickly had an effect on land prices; that as to losses on real estate mortgages the same did not become evident, or rather acute, until later; that in the year 1919 many mortgages were written to secure loans for five or more years and that as to them the foreclosures began from 1924 to 1927 as the mortgages became due and delinquent; that the foreclosures were much larger in number in those years than in the previous years.

Van Peterson, secretary of the Guarantee Fund Commission, testified (Rec., p. 107, Q. 213):

That in his judgment perhaps 75 per cent of the banks taken over by the Department incurred their losses during the years preceding 1923 and that said losses developed during the ensuing years.

On cross-examination, Mr. Schantz stated that from 1920 to 1928 was an abnormal period so far as banks and bank losses were concerned. He refused to state how much he would add to the percentage of losses on account of deflation (Rec., p. 623, Qs. 4048-51).

The foregoing evidence of the origin in the period of high prices of the loans that through the past seven or eight years have gradually developed into losses was not disputed and is not controverted in the record.

The Nebraska Supreme Court in its opinion adopted the uncontradicted evidence of Mr. Woods; we quote from the opinion (Rec., p. 62):

> "In respect of the many failures of banks about this time, the cashier of a Lincoln state bank testified that,

in his opinion, the failure of nearly 300 Nebraska state banks was caused largely by the general economic condition existing prior to 1928; that he did not think the bank assessments from 1923 to July 1, 1928, were a contributing factor in the failure of banks during that period, and that, in his opinion, the guaranty fund law and the assessments collected thereunder had a steadying influence on the deposits of every state bank."

(a) The stabilizing influence of the Guarantee Fund through the period of readjustment.

The Bank Guarantee Fund Law has been of inestimable stabilizing benefit to the existing banks through the last eight years in preventing runs and withdrawal of funds and by instilling confidence, permitting a large number of the existing banks to survive and all of the existing banks to hugely profit in improved financial condition. This testimony was not controverted upon the trial and we need not go into it in detail. The Nebraska Supreme Court recognized this stablizing influence in the above quotations from its opinion.

Mr. Bliss, head of the Department of Trade and Commerce, testified in this connection (Rec., p. 411):

Q. 2455. * * * * "Now, Mr. Bliss, there have been some failures in Nebraska banks that have been testified to. Now, what effect if any, has the existence of the Guarantee Fund Law had upon the going banks in the particular town or location where these failures have occurred from time to time, that is with respect to the deposits of going banks?"

A. "It has been common knowledge that whenever a bank fails that the going bank has not suffered; right across the street from the bank that failed the going bank has gone right along."

Q. 2457. "Is there any general reason for that aside from, perhaps, the strength of the going bank? Has the Guarantee Fund had any application in that respect?"

A. "It certainly has."

Q. 2458. "What has been that effect, Mr. Bliss?"

A. "It has given those depositors and customers in the town where the bank failed—it has given them confidence in the banking situation that they would be taken care of and has been relied upon."

Q. 2459. "And what would you say, Mr. Bliss, as to the conditions that prevailed from 1911 down until immediately prior to the filing of this suit, as to the element of confidence in banks generally, incident to this Guarantee Fund Law?"

A. "It has been very general during that period."

Q. 2460. "In other words, the Guarantee Fund Law has instilled general confidence in the people as to the status of their banks?"

A. "Yes."

Mr. Woods testified (Rec., p. 275, Qs. 1430-33):

That in his opinion this confidence or belief in the uarantee Fund had been a stabilizing factor in pre-enting runs on state banks and also had prevented with-rawal of deposits.

He further testified (Rec., p. 284, Qs. 1481-3):

That the operation of the Guarantee Fund Law from 23 up to the end of the last six months made possible an derly adjustment of the banking situation and made possi-e the recovery of a good many banks that otherwise ould have gone under; that bankers now owning sound nks had told him that they could not have withstood

the heavy withdrawals in 1923 because they had so much frozen paper at that time and that the law gave them sufficient time to earn money, charge off losses, and get their banks into good shape; that it gave banks a few years to realize on frozen assets.

That this stabilization based on confidence in the Guarantee Fund was real is indicated by the consistent increase in deposits, notwithstanding the number of banks that were failing.

Is it conceivable that these going banks which promoted and featured the Guarantee Fund to the extent they did to stabilize the banking situation for their profit and for their preservation can now say to the depositors that helped them over the hill that they owe them no legal or equitable obligation?

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18. Condition of banks has steadily improved since 1923; present condition incomparably better than in 1923.

The undisputed evidence is that there has been a gradual improvement in the condition of the going state banks since 1923 and that they are now in the best condition they have been during the post-war period. Mr. Woods testified (Rec., p. 248, Qs. 1270-75):

> Q. 1270. "What was the relative financial condition of the state banks in Nebraska as of July 1, 1928, as compared with previous years since 1923?"
>
> Q. 1271. "Not figures, just generally?"
>
> A. "Well, if I may supply my own data for comparison, I think maybe I could answer—I don't know how to answer it."

A. "If I understand the question I would say that comparing the ability of the state banks of Nebraska on the whole now to pay depositors upon demand, to meet expense of any kind and to make earnings and pay dividends that the situation in 1928 is vastly improved over 1923. *In every respect, without any exception, their condition is incomparably better than in 1923.*"

Q. 1273. "You have testified as to the comparison between the situation as of July 1, 1928, and 1923?"

A. "Yes."

Q. 1274. "Would you make the same comparison for the succeeding years?"

A. "The degree would go down because there has been more or less steady improvement since 1923. Let me make it plain, I am talking about surviving banks. There have been bank failures and there may be more, because of conditions or what not, but surviving banks have been improving their conditions and are now better able to meet all obligations of whatever nature than they have been at any time since 1923."

Q. 1275. "In other words, there has been a steady improvement from 1923 up to 1928?"

A. "That is my judgment."

The testimony of Mr. Woods was not controverted.

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19. Present claimant depositors (private and public) with adjudicated claims are those who relied on and yielded to the acts and representations of the banks during the last three years. There are $2,000,000 of public funds in failed banks.

The bankers state they were not responsible for their losses on loans developing through deflation and that the

depositor lost in the same manner through the shrinkage of assets.

If this could have any weight as an argument, its weakness is that neither the claimant depositors nor the depositors in going banks are wartime depositors. They made their deposits in the last few years. They are not identified in any way with the developing losses on old loans that these banks have been charging off against earnings.

These individual depositors took losses in their respective business activities during the years immediately subsequent to the war, and there could be no reason in equity or good conscience to nullify their claims against the guarantee fund on deposits that they made in banks in the years subsequent, to-wit, 1926, 1927 and 1928, in order that the going banks may take the earnings that would otherwise be applicable on assessments to pay their own losses and have compensatory to extravagant profits.

Appellants say that "the depositors in failed banks have had the full benefit of all the assessments levied under the law while they were depositors". There is no evidence of and it is not a fact that the claimant depositors in failed banks have received any payment of any sum from assessments.

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20. Material facts with reference to the status of the individual claimant depositor were stipulated.

Rev. J. C. Peterson, of Dannebrog, a depositor, testified as to his deposit and the representations inducing same and his reliance thereon and other related facts as follows (Rec., p. 352):

That he lives at Dannebrog, in Howard county, Nebraska, where he has lived since 1892; that he has been minister of the gospel during all those years; that he was a depositor in the failed Boelus bank and in the failed First State Bank of Dannebrog, then in the hands of receivers and wherein he had been allowed his claims, the major one for $5,460.35 on which he would receive $900 to $1,000 from bank assets; that while they were going banks he was told by the bankers and by people interested in the bank, directors, etc., that his money was perfectly safe; that its repayment was guaranteed by the State Guarantee Fund and that if the bank should fail it would only be a matter of from thirty to sixty days until he would have his money; that two banks in which his deposits were made had signs similar to those introduced in evidence advertising the Guarantee Fund and the safety of the depositors' money; that the signs stated "Your money is guaranteed by the State Guarantee Fund of Nebraska"; that on their checks they had printed the same thing; that Exhibit 18, page 190, volume 3, original record (omitted in printing), is a check drawn by witness on the forms of the First State Bank of Boelus on which it says "Deposits are guaranteed by the Guarantee Fund of the State of Nebraska"; that some of the advertisements in THE FREMONT TRIBUNE that had been previously read at the trial that afternoon were some that he had read. (These exhibits included those in which the banks had represented the Guarantee Fund as a *giant mutual insurance company in which the banks paid the premiums* for the protection of all depositors. They also contained positive statements to the effect that the banks *pledged themselves to pay the assessments* necessary to protect all depositors.) He testified there was one about depositors not losing a cent that he remembered especially and that it

applied to him; that he believed these signs and statements and advertising to be true with reference to the Guarantee Fund; that he relied upon these representations in making his deposits in the banks and that he would not have made the deposits but for the representations about which he testified; that all the banks in Dannebrog had failed; that he renewed his certificates of deposit from time to time after reading the advertisement Exhibit 27 of Exhibit 13 and other advertisements. (The named exhibit is the last one of a series in THE OMAHA BEE publishing the names of the state banks of Nebraska publishing the series, and reproduced in this brief).

After Mr. Peterson had testified and Mr. Carl M. Jorgensen had been called and sworn (Rec., p. 358) the plaintiffs asked the court for a rule fixing the number of depositor witnesses who might testify, stating that an immense number of witnesses might be called on this same proposition. Counsel for defendants stated that they cared only to bring such number of depositors to testify as would show beyond a doubt the representations of the banks hereinbefore set out (referring to the advertisements and representations that the banks were united into a giant mutual insurance company, that they positively promised to pay the assessments and their other similar statements and that the depositors were protected by the Guarantee Fund of the State of Nebraska), that the depositors relied upon these representations and made deposits in these banks which they otherwise would not have made etc. (Rec., p. 358). The interveners expressed willingness to not unnecessarily encumber the record with a number of witnesses if there was a stipulation that they made their deposits upon representations of the banks in which they had their funds when the banks were taken over by the Guarantee Fund Commission (Rec., pp. 358-9).

It was thereupon stipulated by the parties to that effect (Rec., p. 359), to-wit:

That defendants and interveners were able to and would forthwith produce as witnesses, a large number of depositors in different failed state banks throughout the state, who had adjudicated unpaid claims ordered paid from the Guarantee Fund.

That these witnesses if called would testify that prior to making their deposits in the several banks they had seen the same signs exhibited and had had the same representations made to them as had been made to the witness Peterson; that they had read and relied upon the same advertisements as testified to by Peterson (referring to the representations that the state banks under the Guarantee Fund Law constituted *a giant insurance company, wherein the banks paid the premiums for the protection of all the depositors; that the banks pledged themselves to the payment of the assessments necessary to protect all deposits in state banks;* that no depositor could lose one cent, etc.).

That these depositors believed and relied upon these representations, advertisements, etc., and would not have so deposited their money except for their reliance upon them; that the said witnesses were in the same situation as the witness Peterson with respect to their respective deposits and banks; and that the stipulated testimony of said witnesses should be treated and given the same effect as if they had been sworn and testified to the stipulated facts.

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21. Reliance by depositing public on acts and representations.

It is, of course, apparent that the intention of the bankers was that the depositing public should rely upon all the representations that were made to them. Being interrogated specifically as to THE BEE advertisements, Mr. Stephens testified that the purpose of himself and the other bankers in publishing THE BEE and TRIBUNE advertisements was among other things to impress the people with confidence in the banking situation in Nebraska *and confidence in the Guarantee Fund* so that it might have the effect of causing the people to leave deposits they then had in state banks and place other funds on deposit (Rec., p. 534, Qs. 3389-90); that he intended the people to believe the statements in the advertising and never indicated to the public by advertisement or otherwise that the statements were not true or withdrew them in any way; and that the public continued to rely upon them (Rec., p. 535, Qs. 3400-3).

Mr. Schantz stated that he had never repudiated any part of the advertising or told any of the depositors or customers that there was anything in the same that he disapproved of (Rec., p. 606, Qs. 3892-3).

In attempting to excuse the running of the advertisements in THE OMAHA BEE, Mr. Stephens testified that he believed at the time that the accrued liabilities of the Guarantee Fund were not more than two or three million dollars. Just what they were at that time does not appear. It is in evidence that in May, 1927, he knew they were seven million dollars. Mr. Stephens' belief in that regard would not in any sense be a defense to waiver and estoppel created by his acts.

But a more forceful answer to his contention is a reference to his two-page advertisement published in THE

FREMONT TRIBUNE in January, 1928, at a time when he did know what the liabilities were, wherein he continued the same character of advertising and the same representations and which have been hereinbefore quoted from.

Referring to the advertising, personal solicitation, and signs, using the Guarantee Fund feature, and the protective feature, Mr. Woods said (Rec., p. 275):

> Q. 1426. "Mr. Woods, what has been your observation covering the period of the operation of the law, from 1912, as to the influence that such representations by the state banks have had upon depositors in inducing them to make their deposits in the state banks."
>
> A. "It has been effective."

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22. The maximum special assessment was reduced from one per cent to one-half of one per cent by the legislature of Nebraska, 1923, at the instance of the banks.

23. The administration of the Guarantee Fund has been in the hands of the state bankers since 1923.

24. The maximum interest rate on time deposits was reduced from 5 per cent to 4 per cent in 1925 at the instance of the banks on account of Guarantee Fund assessments and the resulting increased annual earnings aggregated one-half the total annual assessments.

The activities of the bankers as a whole in the legislature in procuring such amendments to the law as they desired, and increasing the benefits to them of the Guarantee Fund Law, are clearly established by the evidence and undisputed.

Hon. Charles W. Bryan, governor of Nebraska in 1923, and again elected governor in 1930, called by the interveners, testified, among others, as to the activity of the banks in procuring control of the administration of the Guarantee Fund. He declared that it was during his administration that the Bank Guarantee Fund Law was amended, the Guarantee Fund Commission created and the special assessment reduced from one per cent to one-half of one per cent; that he was familiar with the manner in which the legislation was advocated and finally passed; that the banking committees and groups met in the governor's office; that it was his observation that the bills were pushed and advocated by the bankers of the state; and who demanded that the Guarantee Fund Commission be composed of bankers of their own nomination (Sup. Rec., p. 52).

The legislature of 1925 at the solicitation of the banks and to aid them in paying the Guarantee Fund assessments amended the banking act to reduce the maximum rate of interest permitted to be paid on time deposits from five per cent to four per cent; thereby adding to the earnings of the banks more than $750,000 per year; this amounts annually to approximately one-half of the gross assessments that they were paying to the Guarantee Fund, both general and special.

The facts were also testified to more in detail by Mr. Bliss, now secretary of the department of trade and commerce, who was chairman of the banking committee in the senate in the 1923 and 1925 sessions. The attempt to amend the act was made in the sessions of 1921 and 1923, but finally successful in 1925.

His testimony in this connection was as follows (Rec., p. 379):

Mr. Bliss testified that he had been in the banking business since 1907 and a member of the State Bankers Association; was its president in 1926 until he took the office of secretary of the Banking Department; he served in the state senate in the sessions of 1921, 1923 and 1925; was chairman of the banking committee in 1923 and 1925; that all the bankers of the state, with possibly twenty to twenty-five exceptions, are members of the State Association; that the Association maintains a permanent office in Omaha with a force of employees and has for twenty years; that he was in the legislature of 1923 that amended the Guarantee Fund Act by reducing the rate of interest paid by the state banks on certificates of deposit and interest bearing funds; that the effective date of the act was April, 1926; that he had examined the records of his office (state banking department), and on June 30, 1926, there was on deposit in the state banks of Nebraska $167,462,943.00, interest bearing deposits; that a year later, on June 30, 1927, such interest bearing deposits were $173,203,955.00 (Rec., p. 384, Q. 2275). Notwithstanding the reduction of one per cent in the interest rate, interest bearing deposits had increased $6,000,000.

Mr. Bliss, continuing, testified that in the sessions of the legislature of 1921, 1923 and 1925 there were extensive hearings on the act before the committee on banking; that prominent bankers appeared in promotion of the legislation during the session of 1925 (Rec., p. 388, Qs. 2309-10); that he did not recall that anyone other than bankers appeared in favor of the reduction (Rec., p. 389, Q. 2311); that the bankers felt, and agitated to the committee in

1923 that by paying four per cent for money, plus the then one per cent special assessment, it would make their time money cost them too much; that the bankers generally requested this reduction and that the committee thereupon made a favorable report to the senate upon the bill (Rec., p. 390).

Mr. Bliss stated that at the time of the enactment of the law, 646 of the state banks were paying as high as 5% interest on deposits and that these banks had $110,520,583 of deposits at interest, and that he was able to state with reasonable accuracy the amount of these deposits then drawing 5% (Rec., p. 449, Qs. 2703-13). The trial court sustained an objection to his answering and defendants offered to prove that more than two-thirds of the deposits, to-wit, at least $74,000,000 of deposits were bearing 5% interest (Rec., p. 451, Q. 2714). The interest bearing deposits increased instead of diminished thereafter so there was a saving to the banks of approximately $740,000 a year on this item.

CONDITION AND EARNINGS OF BANKS

25. The earnings of and data on all state banks as shown by their reports for the eighteen months, January 1, 1927, to June 30, 1928, the fiscal period immediately preceding this suit (Ex. 37 and 38 produced by defendants).

The operating expenses, income and net earnings of the state banks of Nebraska were shown by their reports for two and one-half years preceding the suit (Ex. 37, 38 and 39, produced by defendants). The Department of Trade and Commerce produced comprehensive tabular statements

covering all the banks of the state (Exhibits 37 and 38); the last available data on the banks, covering the period of eighteen months, January 1, 1927, to June 30, 1928, the fiscal six months period immediately preceding this suit. Exhibit 39 covered the twelve month period from July 1, 1925, to June 30, 1926.

These three exhibits give all the available official data for the two and one-half year period.

Inasmuch as the tabular statements for the eighteen months ending June 30, 1928, gave the figures of the department for the last available period, we will refer to them first.

As hereinbefore shown, Exhibit 37 contained the data as to each bank individually by name. The appellants have omitted that exhibit from the record in this court.

Eight employes in the Department of Trade and Commerce worked two weeks in getting out this Exhibit 37 (Rec., p. 121, Q. 2567). It was the desire of defendant officials to make a complete showing of all the available facts. Exhibit 37 was recapitulated by the department in Exhibit 38 (Rec., p. 131, Qs. 2587-8). Exhibit 38 is reproduced immediately hereafter in this brief. It will therefrom be noted that in Exhibits 37 and 38 the facts were compiled separately on those banks organized prior to 1909, the date of passage of the Guarantee Fund Law and those organized since. It appears that of the banks now operating in Nebraska, 435 were organized prior to 1909 and 291 since. As to those banks organized since 1909 their growth and profits have been under the protective period of the Guarantee Fund Law. We are unable to

refer to specific banks by reason of the omission of Exhibit 37, but sufficient appears in Exhibit 38, the recapitulation, to completely negative the contention of the banks herein. Following Exhibit 38 is an analysis thereof.

(a) **Exhibit 38 is as follows:**

RECAPITULATION

(Exhibit 38, Page 610, Vol. 2, B. of Ex.)

(Note--Being a totaling of the data as to all of the 726 Banks of Nebraska listed and itemized by individual banks in 16 sheets, Ex. 37, P. 60, V. 2, and each bank there set forth in detail.)

Capital --		
435 banks organized prior to 1909	$10,856,000.00	
291 " " 1909 and after	8,019,500.00	
Total 726 banks		$18,875,500.00
Surplus --		
435 banks organized prior to 1909	$ 4,058,280.22	
291 " " 1909 and after	2,024,777.40	
Total 726 banks		6,083,057.62
Total Capital and Surplus 726 banks		$24,958,557.62
Total State deposits in 726 banks		$ 984,399.59
Total County deposits in 726 banks		10,230,619.10
Total City deposits in 726 banks		2,739,695.96
Total Dividends for all banks 12 months ending 12/31/27	$ 867,231.76	
Total Dividends for all banks 6 months ending 6/30/28	540,036.91	
Total for 18 months		$ 1,407,268.67
Total Net Profits after charge-offs since organization to 6/30/28:		
435 banks organized prior to 1909	$18,063,801.62	
291 " " 1909 and after	6,227,088.43	
Total for 726 banks		$24,290,890.05
Total Net Earnings before charge-offs, 18 months ending 6/30/28:		
435 banks organized prior to 1909	$ 2,450,067.56	
291 " " 1909 and after	1,719,420.04	
Total for 726 banks		$ 4,169,487.52
Gross Charge-offs 18 months ending 6/30/28:		
435 banks organized prior to 1909	$ 1,324,509.22	
291 " " 1909 and after	909,459.18	
Total for 726 banks		$ 2,233,968.40
Net Earnings after charge-offs, 18 months ending 6/30/28:		
349 banks organized prior to 1909	$ 1,474,408.22	
221 " " 1909 and after	1,019,910.72	
Total for 570 banks		$ 2,494,318.94
Net Deficits in earnings after charge-offs 18 months ending 6/30/28:		
86 banks organized prior to 1909--	$ 348,849.88	
70 " " 1909 and after--	209,949.66	
(Total charge-offs in above 156 banks were $851,433.22, creating this deficit)		
Total 156 banks		$ 558,799.54
Total Net Earnings after charge-offs, 726 banks		$ 1,935,519.40

Net Undivided Profits and Surplus:		
435 banks organized prior to 1909	$ 5,344,850.24	
291 banks organized 1909 and after	3,003,563.62	
Total 726 banks		$ 8,348,413.9
Percentage Net Earnings before charge-offs, 18 months ending 6/30/28 to Capital:		
435 banks organized prior to 1909		23.49%
(Note - Annual average is 15.66%)		
291 banks organized 1909 and after		21.44%
(Note - Annual average is 14.29%)		
Percentage Net Earnings after charge-offs, 18 months ending 6/30/28 to Capital:		
(349 banks less 86 deficits) prior to 1909		10.36%
(Note - Annual average is 6.91%)		
(221 banks less 70 deficits) 1909 and after		10.99%
(Note - Annual average is 7.33%)		
Gross Earnings for year 1927 in 435 banks organized prior to 1909		$ 9,310,984.3
Gross Earnings for 6 months period ending June 30, 1928, in 435 banks organized prior to 1909		4,997,139.7
Gross Earnings for year 1927 in 291 banks organized since and including 1909		6,359,891.2
Gross Earnings for 6 months period ending June 30, 1928 in 291 banks organized since and including 1909		3,303,646.6
Total Gross Earnings 726 banks, 18 months ending June 30, 1928		$23,977,661.9
(Note - Annual average is $15,985,107.99: or 85% of capital and 64% of capital and surplus.)		
Total assessments paid into Depositors' Guaranty Fund by 726 banks for 18 months ending June 30, 1928		$ 2,412,324.7
(Note - Annual average is $1,618,216.52)		
Percentage of assessments paid into Depositors' Guaranty Fund to gross earnings of 726 banks totalling $23,749,077.47 for 18 months ending June 30. 1928		10.06%

(Copy of Exhibit 38; except in several instances where figures are shown for 18 months we have added also for convenience of Court as a "Note" a calculation of the annual average of the 18 months' figure.)

(U S Sup Court Rec P 437-8)

The foregoing exhibit 38 discloses that

(b) The banks earned an average profit of 7.12 per cent per annum on their capital after all Guarantee Fund assessments had been paid and after "charging off" over $2,200,000 (about 7.72 per cent per annum on capital) to losses.

(c) 570 of the 726 banks had net earnings ranging up to "extravagant profits"; the other 156 banks were affected by "charging off" excessive amounts; four-fifths could have paid dividends; the other one-fifth could have except for their extraordinary "charge-offs" through liquidation of wartime acquired assets.

The capital is shown to be $18,875,500 and surplus $6,083,057.

EARNINGS. Attention is especially called to the fact that *after all charge-offs of losses* and after the deduction of all deficits of those banks that showed a deficit, the net earnings on capital for the 18 months period of the 726 banks were 10.36 per cent as to those banks organized prior to 1909 and 10.99 per cent as to those banks organized since 1909, or an average of 10.67 per cent for all the banks on their capital for the eighteen months period, equal to 7.12 per cent per annum on their capital. If we figure the net earnings of the 726 banks on both capital and surplus we find that the capital and surplus of all the banks after paying all Guarantee Fund assessments and making all charge-offs was $1,935,519, amounting to 7.75 per cent on the entire capital and surplus for the eighteen months or 5.17 per cent per annum.

CHARGE-OFFS. It is especially to be noted that the banks "charged off" to losses during the 18 months period $2,233,968, an amount practically equivalent to 7.72 per cent on capital and 6 per cent annually on their capital and surplus; and all charged out of earnings. We have elsewhere in this brief shown that these extraordinary losses were the liquidation losses through realization on assets acquired in the inflation period long prior to the making of the deposits on which present claims are based. These losses were in effect stockholders' investment losses, and were in no sense attributable to the Guarantee Fund Law.

NET EARNINGS BEFORE CHARGE-OFFS. After paying Guarantee Fund assessments and before making these charge-offs, the 435 banks organized prior to 1909 had net earnings on their capital of 23.49 per cent, or an annual average of 15.66 per cent. Those organized after 1909, 21.41 per cent or an annual average of 14.29 per cent. On both capital and surplus, the earnings were one-fourth less.

GUARANTEE FUND. As disclosed, the payments to the Guarantee Fund were 10.06 cents out of each dollar of gross earnings for the entire eighteen months.

BANKS WITH NET DEFICITS. It will be noted that 570 of the 726 banks reporting had total earnings of $2,494,318 after all "charge-offs" of bad debts, and after paying Guarantee Fund assessments. There were, however, 156 banks that failed to make net earnings after heavy charge-offs of bad debts, their net deficit being $558,799 for the eighteen months. During that period they charged off as bad debts $851,433.22, making their actual earnings $292,633, the difference between their

"charge-offs and their net deficit". It is not denied that this deficiency was attributable to excessive charge-off of bad debts instead of to the payment of the Guarantee Fund assessments. The banks would still have had to charge off these losses occasioned as above even if there had been no Guarantee Fund Law.

DIVIDENDS. Appellants make some point of the fact that only one-third of the banks of the state paid dividends in 1927 and 1928. They carefully ignore the earnings of the banks. The foregoing statement shows that four-fifths (570) of the banks of the state had net earnings for the eighteen months period ending June 30, 1928, *after all charge-offs and the payments of the Guarantee Fund assessments,* so that four-fifths of the banks could have declared dividends in some amount ranging up to "extravagant profits" had they elected to do so (Exhibit 38). The amount of earnings is the important fact.

Again, these net earnings were after the large "charge-offs" against earnings to absorb losses arising during deflation; to which the going banks had so largely devoted their earnings (Bliss, Rec., p. 208, Qs. 1043-4).

The banks actually paid dividends for the eighteen months of $1,407,268.00, which was an average for all the banks of 7.45 per cent on the capital of $18,875,500.00 and 5.62 per cent on total capital and surplus of $24,958,557.00. Figured on an annual basis the percentage would be reduced one-third.

In their brief, plaintiffs stress their Exhibit 52. Witness E. L. Fulk, certified public accountant, checked up defendants' Exhibit 37, and prepared, and plaintiff introduced in evidence, the compilation identified as Exhibit 52 (Rec.,

p. 567). The accuracy of the net earnings as shown in Exhibit 37 are not questioned, but in this Exhibit 52 of Mr. Fulk the computations and compilations are made up by him on *percentage of numbers of banks*, which of course is not a fair criterion. For instance, he shows that 24.24 per cent of the total banks in number earned 76.21 per cent of the total net earnings of all the banks for the eighteen months period ending June 30, 1928, but he fails to indicate anywhere on his exhibit the ratio of the capital and surplus of those 176 banks to the total capital and surplus, or the ratio of the deposits of those 176 banks to the total deposits. Such information is indispensable. As illustrative of the point, the strong and prosperous State Bank of Omaha, in capital and surplus, is equal to 30 banks like the Abie State Bank and has forty-nine times the deposits; and still a larger ratio of earnings.

(d) The Trial Court Misled.

An unfair and deceptive statement in Exhibit 52 and one which misled the trial court is the statement "that 410 banks, whose net earnings after charge-offs for the eighteen months period ending June 30, 1928, were less than 6 per cent on combined capital and surplus, had a loss of $179,170.00." In these 410 banks is included the list of banks that had profits up to 6 per cent, and 156 banks that had excessive charge-offs as above noted; these latter are combined with the profit-earning banks to produce a net red figure for the 410. As a matters of fact plaintiffs' own exhibit shows in another place in harmony with the defendants' exhibit that 156 banks had excessive bad debts of $558,889.00. Throwing these banks in with the banks earning less than 6 per cent wipes out the earnings of the other 254 banks included. This juggling of figures is clever but unfair and misleading.

The trial court evidently was misled, for he stated in his opinion: "56.47 per cent of the total banks were not only earning less than 6 per cent per annum on their combined capital and surplus, as of June 30, 1928, but also show their earnings in the red, in the sum of $179,170.00." The trial court also said: "These same banks paid assessments into the Depositors' Guarantee Fund for the eighteen months period of $2,412,724.78, which sum is $476,805.38 more than the total net earnings of said banks for the same period."

This statement is liable to be misunderstood and the trial court apparently misunderstood the record in that regard. The net earnings of the banks, *after paying the Guarantee Fund assessments* and before making charge-offs for bad debts, were $4,169,487.52. Against this the banks charged off bad debts of $2,223,968.40, leaving net earnings, after bad debt charge-offs and after payment of Guarantee Fund assessments, of $1,935,519.12. The net earnings after charge-offs and after paying Guarantee Fund assessments of 570 of the banks were $2,494,318.94.

Appellants state in their brief that Mr. Marshall, a deputy in the office of the Secretary of the Department of Trade and Commerce, testified to the necessity of "charge-offs" during the eighteen months period which would have wiped out entirely the net earnings for that period. Mr. Marshall did not testify to any such facts.

The supposed basis for appellants' statement is the examiner's criticism of items in different going banks; which criticisms were made in the ordinary course of examination and which were taken care of by the banks; the evidence of Mr. Marshall and Mr. Bliss with reference to this is fully covered under subdivision No. 35 of this brief.

Plaintiffs prepared and introduced Exhibits 6, 7 and 8.

They purported to reflect the condition of the state banks for three six-months periods beginning January 1, 1927, and ending July 1, 1928.

These exhibits were prepared by Witness Mooney (an employee of Mr. Fulk). They were compiled from the records of the banking department to which he was given access. As collected together they were grossly unfair and misleading as will hereafter appear. They were the only data produced by appellants at the trial from the official records of the banking department, nor for that matter was any produced from the records of the banks (except Abie State). *These Exhibits 6, 7 and 8 are not even included in the record brought to this court*, but appellants refer to them on page 28 of their brief by quoting Witness Mooney with reference to these exhibits as follows:

> "His testimony from his examination was that during the period from January 1, 1928, to June 30, 1928 (Rec., p. 134, Q. 369), 353 of the 726 banks showed earnings to each of less than 6 per cent per annum (Rec., p. 135, Q. 380), and that the combined aggregate net loss of this class of banks was $356,076.18 (Rec., p. 136, Q. 391), and that these 353 banks contributed to the Guarantee Fund in assessments during that same period $301,006.98 (Rec., p. 137, Q. 392).
>
> "During the period from January 1, 1927, to June 30, 1927, he testified that there were 113 banks (Rec., p. 138, Qs. 395-397) of the 726 existing banks, each which made less than 6 per cent per annum on its capital.
>
> "He further testified that, during the period from July 1, 1927, to December 31, 1927, of the 726 existing banks there were 376 (Rec., p. 139, Q. 407; p. 140, Q. 411), each of which received less than 6 per cent per annum earnings.

A full disclosure of the method of compilation is prevented by the omission of these exhibits from the record, but sufficient appear from the oral testimony of the Witness Mooney, commencing on Record, page 137, question 357, to give a substantial insight.

Mr. Mooney was given access in the department to the semi-annual reports of *all the banks* for each of the three six months periods. Instead of listing them all for the eighteen months, or for that matter listing such banks as he desired for the entire eighteen months, or even for a year, he picked out a different list of banks for each six months period: for instance, making one list as Exhibit 6, another as Exhibit 7, and another as Exhibit 8. By this method if a bank's net income was largely contained in the first six months period of the year, and its outgo in the second six months' period, or vice versa, Mr. Mooney listed it in the six months' period in which it had earnings of less than 6% and omitted it from the other period. In this way he made banks which had good or high average net earnings for a year or more appear among the list of losing banks. Thus the above 353 banks were picked for one six months' period, a different list of 376 banks was picked for another six months' period and still a different list of 413 banks for another six months' period.

There were only 112 banks that appeared in all of the lists as earning less than 6% (Rec., p. 43).

Now these reports in the Department he thus juggled show the income and earnings of all 726 banks of Nebraska for the full eighteen months. Defendants compiled its Exhibits 37 and 38 from them. Why did the banks thus seek to avoid the full disclosure? Because for the

eighteen months' period four-fifths (570) of the banks had net earnings, ranging from fair to "extravagant profits" after charging off bad debts and paying Guarantee Fund assessments. It appeared that the only reason the other one-fifth did not have net earnings was on account of exorbitant bad debt charge offs.

Again as to this evidence please note Mr. Mooney showed that the 353 banks covered in one six months' period had aggregate net losses of $356,076; but only cross-examination developed that these same banks had $636,000 of undivided profits accumulated against which these losses were charged (Mooney, Rec., p. 143, Q. 450). A fair reflection of the full facts is the compilations, Exhibits 37 and 38, made from the same bank reports, but for a period of 18 months. The accuracy of these exhibits is unquestioned.

In the brief of plaintiffs and in the opinion of the trial court frequent comparison is made as between assessments paid and net earnings and the statement is made that the assessments were more than the earnings or total net earnings by a specified amount.

The court's attention is especially called to the fact that this statement does not mean that there was a shortage in earnings of that amount. The TOTAL REMAINING NET EARNINGS, AFTER the payment of Guarantee Fund assessments, charging off losses, etc., was by comparison less than the amount theretofore paid to the guarantee fund, by the amount stated.

For instance, in the trial court's opinion, in apparently drawing a deduction favorable to the 726 banks, the court says (Rec., p. 44):

> "These same banks paid assessments into the depositors' guarantee fund for the eighteen months of

$2,412,324.78, which sum is $476,805.38 more than the total earnings of said banks for the same period."

Now what are the illustrative facts (see Exhibit 38)? For the eighteen months the total net earnings *after* paying guarantee fund assessments and before charging off bad debts was $4,169,487.52; the guarantee fund assessments had been $2,412,324.76. So the earnings before paying guarantee fund assessments and charging off bad debts were a total of $6,681,812.28.

So we have this situation:

Total earnings 726 banks before paying guarantee fund and charging off of bad debts	$6,681,812.28
Paid to guarantee fund	2,412,324.76
Net earnings 726 banks before charge-offs of bad debts	4,169,487.52
Charge-off of bad debts	2,233,968.40
Net remaining after both deductions	$1,935,519.12

While the guarantee fund assessments theretofore paid were greater in the aggregate than the net earnings remaining, it is also true that the bad debts charged off were about $300,000 greater than the net remaining. The important thing is that $1,935,512 *remains after* deducting both assessments and losses.

It is important to note that of the $2,233,968 charged off by all the 726 banks in the eighteen months as bad debts, $851,432 was charged off by 156 banks, and the remainder ($1,382,535.18) by 570 banks. The 570 banks all had net earnings remaining after these charge-offs and payment of guarantee fund assessments, and ranging up

to "extravagant profits". The 156 banks with charge-offs of $851,433.22 had net losses of $558,799.54, so their profits before charge-offs had been $292,633.68. Manifestly these 156 banks are now in improved condition. There is no evidence that they are not in good condition, and the court of course could not presume the contrary. The 570 banks earned $3,876,854.12 after paying guarantee fund assessments, took losses of $1,382,535.18, and had $2,494,318.94 remaining, and all had net earnings thereafter.

Some effort was made to show that the charge-offs made during the eighteen months were only normal ones, but this argument completely disappears in the face of the tables of operations in other jurisdictions, and especially in the face of the fact that it was the 156 banks that charged off the large and excessive losses, and they were the ones that had the losses exceeding earnings, and that the losses of these 156 were 60 per cent of the losses of the 570, conclusively showing the very excessive character of the losses of the 156 banks. If 156 banks with $292,633.68 of net earnings before charging off bad debts charged off $851,433.00, or an amount equivalent to 60 per cent of what the 570 banks charged off against their $3,876,854.00 of earnings, the experience of the 156 is certainly not to be the criterion for judging this case and relieving the entire 726 banks of the state from their obligation to the guarantee fund. The logical and inevitable deduction to be drawn from the figures is that 570 of the banks were during the preceding period on a solid footing and earning net profits over and above all obligations, including payments to the guarantee fund and the losses charged off, and that the other 156 improved their condition during the eighteen months and did so as against accumulated earnings. In no event can it be said that the guarantee fund was an adverse factor.

(e) The "Other Real Estate" item is worth amount at which carried by banks, it was not increased but has been minimized by the Guaranty Fund and the featuring of it by the banks.

While the item "Other Real Estate" shown in the reports of the state banks is not a desirable asset the fact is, as Mr. Bliss testified, that many of the banks have a profit in the real estate they are carrying and neither his records nor the examiners' reports show that this item of real estate is carried at an excessive value (Rec., pp. 157 S. Op. 580 L.). There is no evidence that it is worth less than the amount carried at in the reports of the banks, and appellants cite no evidence to support their statement that it is of less value.

Appellants take Secretary Peterson's testimony as to the Guaranty Fund Commission's realization of 43% on real estate in failed banks in receivership and uses this as a basis for estimating the value of real estate in the going banks. By the same token they could take the realization on other assets of insolvent failed banks and state that the assets in the going banks were of the same percentage of value.

The item "Other Real Estate" largely grows out of the taking over by the banks of property upon which they had liens. The origin of the loans admittedly nearly all date back to the inflation period and this item has been swelled since by the liquidation and conversion of such loans.

This item has no relation to the Guaranty Fund, or the adjudicated claims of depositors.

It has been argued that but for the Guarantee Fund the assessments paid thereon could have been applied to reduce this item. This ignores the benefits and earnings accruing from and by reason of the Guarantee Fund, disregards the fact that the real estate is not carried at an excessive figure and wholly disregards the priority of right of the claimant depositor over that of the stockholder.

A large number of the banks now asked to pay these assessments would admittedly not have been in existence but for the Guarantee Fund. But for the fact of the Guarantee Fund and its benefits and the faith of the depositors in the Fund and their reliance thereon inducing them to keep their deposits in the existing banks many of the banks that now hold "other Real Estate" would admittedly now not be open. The amount used to pay Guarantee Fund assessments could not have been applied to reduce this item, because the earnings that paid the Guarantee Fund assessments largely came by reason of the Guarantee Fund Law and its operation. Without the benefits of that law there would not have been the earnings.

So it is unsound to state that the amount applied to pay Guarantee Fund assessments could have been used to reduce real estate or charge off bad loans. The benefits of the Guarantee Fund are admitted of record and cannot be fairly measured in dollars and cents.

It is the theory of the banks, shared by the trial court, that on this record the banks *as a whole* are entitled to charge off old bad debts from earnings, then reduce to extinction the amount at which "other real estate" is carried (though not shown to be excessive), then pay compensatory returns to stockholders, and lastly pay the guar-

antee fund assessments, and that any other course is confiscatory. This also ignores the fundamental principles of the law.

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26. The earnings and data on all state banks for the year ending June 20, 1926, classified according to capital arranged from 4.47 per cent to 11.45 per cent (not including Omaha State Bank with its larger earnings).

The defendants produced at the trial a compiled statement of data as to all the state banks showing their expenses, income and net earnings for the year ending June 30, 1926, being for a period immediately preceding the foregoing 18 months except for an interval of six months for which figures were not available. This exhibit had been prepared in the latter part of 1926 by Epes Corey, auditor of the banking department from answers to a questionnaire to the banks and was published at that time (Rec., p. 489).

The banks are classified as to capital up to $200,000. There was one bank omitted from this compilation,—the State Bank of Omaha with a capital in excess of $200,000, on account of its being the only bank in that classification. Its large profits and earnings as herein elsewhere set forth would increase, rather than decrease the percentages in Exhibit 39.

We here reproduce Exhibit 39 and follow it with an analysis thereof:

Analysis of Operating Expenses and Income of 845 Nebraska State Banks

From July 1, 1925 to June 30, 1926

CAPITAL	10,000 to 20,000	20,000 to 40,000	40,000 to 75,000	75,000 to 100,000	100,000 to 200,000	
	206 Banks	426 Banks	177 Banks	18 Banks	18 Banks	845 Banks†
Interest on Deposits and Savings	$800,024	$3,295,204	$2,583,324	$348,366	$598,033	$7,624,951
Interest on Borrowed Money	30,254	115,483	92,060	11,196	7,132	256,125
Guarantee Fund Assessments	166,120	636,258	486,573	63,844	142,813	1,495,608*
Salaries and Wages	496,890	1,721,821	1,267,654	155,450	294,061	3,935,876
Other Expenses	332,321	1,377,074	1,069,137	142,491	232,070	3,153,093
Total Expenses	$1,825,609	$7,145,840	$5,498,748	$721,347	$1,274,109	$16,465,653
Total Income	$1,965,140	$7,735,871	$6,082,979	$807,239	$1,539,315	$18,130,544
Net Income	$139,531	$590,031	$548,231	$85,892	$265,206	$1,664,891
Total Deposits	$27,131,711	$111,344,441	$86,517,996	$12,219,191	$22,710,445	$259,923,784
Average Deposits	$131,773	$261,372	$488,802	$678,844	$1,261,691	$307,602
Average Capital Per Bank	$15,157	$27,963	$52,484	$80,921	$128,639	$33,250
Net Profit on Capital and Surplus	4.47%	4.95%	6.28%	5.90%	11.45%	5.924%
Average Income Per Bank	$9,539	$18,159	$34,367	$44,846	$85,517	$21,456
Average Expense Per Bank	$8,862	$16,774	$31,066	$40,075	$70,784	$19,486
Average Net Profit Per Bank	$677	$1,385	$3,301	$4,771	$14,733	$1,970
DISTRIBUTION OF $1.00 OF EXPENSE						
Interest on Deposits and Savings	43.82c	46.11c	46.98c	48.30c	46.94c	46.31c
Interest on Borrowed Money	1.66c	1.61c	1.67c	1.55c	0.56c	1.56c
Guarantee Fund Assessments	9.09c	8.90c	8.85c	8.85c	11.21c	9.08c
Salaries and Wages	27.22c	24.10c	23.06c	21.55c	23.08c	23.90c
Other Expenses	18.21c	19.28c	19.44c	19.75c	18.21c	19.15c
	100.00c	100.00c	100.00c	100.00c	100.00c	100.00c
EXPENSE (Per Cent of Deposits)						
Interest on Deposits and Savings	2.947%	2.959%	2.983%	2.850%	2.633%	2.931%
Interest on Borrowed Money	.111%	.103%	.106%	.091%	.032%	.099%
Guarantee Fund Assessments	.611%	.571%	.562%	.522%	.630%	.575%
Salaries and Wages	1.831%	1.547%	1.464%	1.271%	1.294%	1.513%
Other Expenses	1.225%	1.237%	1.235%	1.170%	1.021%	1.212%
Average Per Cent of Expense on Deposits	6.725%	6.417%	6.350%	5.904%	5.610%	6.330%
Average Per Cent of Income on Deposits	7.23%	6.947%	7.03%	6.614%	6.777%	6.97%
Average Per Cent Net Profit on Deposits	.51%	.53%	.68%	.71%	1.167%	.64%

†Thirty-eight Guaranty Fund Commission Banks and ten delayed reports not included. 893 State Banks in Nebraska June 30, 1926.
*Total assessments levied during period aggregate six-tenths of one per cent. Deficiency arises because of different dates assessments were entered.

(Ex. 39 P 710. V3, Bof Ex)
(U S. Sup. Court Rec., P 494 + 495)

COMPILED BY
DEPARTMENT OF TRADE AND COMMERCE
LINCOLN, NEBRASKA

With this compilation for the year ending June 30, 1926, and the compilation, Exhibit 38, we have definite reports by the banks on their income and disbursements from July 1, 1925, to June 30, 1928, with the exception of one six months period between the two reports (for which no reports were available). A striking similarity as to income is evidenced by a comparison of the two. Exhibit 39 as will be noted, is classified between banks as to size.

The banks shown in this Exhibit 39 had gross income for the twelve months of $16,465,653. Exhibit 38 shows that the income of all the banks for the eighteen months period referred to therein was $24,958,557. The one period being twelve months and the other eighteen, it will be noted that their annual averages are about the same. During the fiscal year July 1, 1925, to June 30, 1926, there were more banks and with the addition of the State Bank of Omaha there would be a little larger relative income for the period but about the same considering the number of banks. The exhibit discloses that the net profit on capital and surplus of all the banks for the fiscal year ending June 30, 1926, was an average of 5.924 per cent; this after paying all Guarantee Fund assessments. The banks with capital of $10,000 to $20,000 earned 4.47 per cent; those between $20,000 to $40,000 earned 4.95 per cent; those between $40,000 and $75,000 earned 6.28 per cent; those between $75,000 and $100,000 earned 5.90 per cent; and those between $100,000 and $200,000 earned 11.45 per cent. Mr. Schantz's State Bank of Omaha far exceeded this latter figure, as herein otherwise appears.

It will be noted also that of each dollar of disbursements an average of only 9.08 cents went to the Guarantee Fund,

and that the banks in the highest capital classification paid the highest percentage to the Guarantee Fund, to-wit, 11.21 cents on the dollar.

It further appears that the average income per bank and the average expense per bank in each classification bears approximately the same ratio to capital. *This average of 5.924 per cent net profit of all the banks was on both capital and surplus and after paying $1495,698.00 to the Guarantee Fund on deposits of $259,923,784.00.*

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27. Present condition of the banks; their reports at the time of institution of suit showed healthy condition.

This case was filed in the latter part of December, 1928.

In connection with the then condition of the state banks especial reference is called to exhibits showing their condition as of June 30, 1928 (Rec., p. 664, Ex. 61), and December 31, 1928 (Rec., p. 423, Ex. 22), being compilations of their semi-annual call reports as of those dates. The last one being within 10 days after the filing of this suit, and showing a very healthy condition. Inspection and analysis thereof shows that on December 31, 1928, the banks had more than twenty per cent cash reserve, to-wit, $48,792,700 in cash and cash in banks and in addition had $36,900,831 in bonds and securities which are readily convertible and which banks are now carrying largely as the equivalent of cash. The banks thus had in cash and its equivalent $85,692,531 or about 33⅓ per cent of their deposits. This splendid showing confirmed the testimony of Mr. Woods and Mr. Bliss as to the condition of the banks.

The December 31 reports, compared with the June 30, 1928, reports (Ex. 61) show that while the number of banks had declined nineteen in the six months' period the aggregate surplus and profits had increased: $8,603,791.14 for 745 banks on June 30, 1928, as against $8,951,829.06 for 726 banks on December 31, 1928.

The condition of existing banks has improved consistently and steadily since 1923. As the witness, Mr. Woods, heretofore quoted, put it, "In every respect, and without any exception, their condition is incomparably better than in 1923." This evidence was not questioned. It stands admitted.

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28. The large profits and prosperity of the three large banks sponsoring this suit.

It appears from the evidence that the principal bankers sponsoring this suit are officers of a few state banks which have highly prospered largely because of and by virtue of the Guarantee Fund Law and who have been its foremost advocates. It affirmatively appears that their banks are amply able to pay the Guarantee Fund assessments from large earnings. These men are A. L. Schantz, president and majority owner of the State Bank of Omaha, Nebraska's largest state bank; Dan V. Stephens, president and majority owner of the Fremont State Bank; and William Seelenfreund, president of the Continental State Bank of Lincoln. With the exception of an Abie bank officer, they were the only bankers appearing in the trial of the case. Dan V. Stephens, president of the Fremont State Bank, called a meeting of a few bankers, including Mr. Schantz of the State Bank of Omaha, at Fremont, where a com-

mittee was appointed to have charge of this suit (Rec., p. 307, Qs. 1662-72). The use made by these banks of the Guarantee Fund Law as an effective ladder upon which to climb is elsewhere referred to in this brief, but it is desirable at this point to quote some figures as to their enormous growth and enormous profits under the Guarantee Fund Law.

STATE BANK OF OMAHA: This bank was organized in 1912. Its original capital was $300,000.00 and surplus $37,500.00. At the time of the trial, 17 years after organization, the surplus was $200,000.00, of which $112,500.00 was from earnings. During the same period the bank paid $294,000.00 in dividends. For seven years before the trial it had been paying 10 per cent dividends on the capital besides the amount that had been passed to surplus (Rec., p. 224, Qs. 1138-43). Its deposits have grown to approximately seven million dollars. In 1915 it absorbed another bank with two million, two hundred thousand dollars of deposits (Rec., p. 361, Q. 2097).

FREMONT STATE BANK OF FREMONT: Dan V. Stephens was majority owner of this bank. He became actively connected with the Fremont State Bank in 1920 and from then on down to practically the commencement of this suit he was an active exponent of the Guarantee Fund Law and his bank probably one of the chief beneficiaries of the law. He gave wide circulation to his views; during the two years preceding the suit, his bank used from 1,200 to 1,500 inches of advertising space a year in THE FREMONT EVENING TRIBUNE, in advancing its interests by featuring the Guarantee Fund Law (Mr. Sorensen, vice-president, Q. 1838, p. 324, Rec.).

In November, 1920, when Mr. Stephens began promotion of the Guarantee Fund Law, his bank had capital, surplus and undivided profits of $68,277 and deposits of $390,037 (Ex. A, p. 412, vol. 3, Orig. Rec.). The aggregate capital and surplus September 20, 1928, was $136,704.00. Of this the stockholders had paid in $87,500, possibly $5,000 more, leaving $44,204 accumulated from earnings and more than $30,000 of which had been accumulated since 1920. Furthermore, the bank had continuously paid dividends of 8 per cent per annum (p. 311, Rec., Qs. 1700-7). The bank in September, 1928, had deposits of $1,744,684, four and one-half times its deposits eight years prior. Mr. Stephens testified that his bank had prospered during the last eight years and it had become the largest bank in the city of Fremont, measured by deposits (Rec., 375-6, Qs. 2202-6).

CONTINENTAL STATE BANK OF LINCOLN: This bank was organized in 1909, concurrently with the enactment of the Guarantee Fund Law (Rec., p. 14). On November 13, 1920, it had deposits of $1,313,908; seven and one-half years later, on June 30, 1928, it had deposits of $4,056,056 (Rec., p. 398, Qs. 2369-70). By reason of the omission by the appellants of Exhibit 37 from the record, we are unable to give further details in this brief as to its net earnings for the eighteen months period ending June 30, 1928, immediately prior to the institution of this suit. In that exhibit this information appeared as to each of the individual banks. Recapitulated as to all banks in Exhibit 38. (Mr. Marshall, Rec., pp. 429-30, Qs. 2568-78).

It is fairly inferred from the record that but for these few large state banks, the present suit would not have started.

29. The small Abie State Bank in a town of 200 people earned and paid dividends of 10 per cent to 15 per cent until causes other than the Guaranty Fund stopped them; the bank in its environment was not a typical member of any class of banks.

The Abie State Bank is really not the plaintiff in this suit; it fairly appears that it is but the screen under which several large city state banks prosecute this suit. It is not a representative bank and it is ridiculous to treat it as illustrative of banking conditions generally in Nebraska. It was the only state bank with reference to which plaintiffs made any attempt to show any details of operation and even as to it, the facts in no degree supported plaintiff's case. In view of its position as the only bank offering some details of operation, we have abstracted the testimony as to it fully as follows:

Mr. Svoboda, cashier of the Abie State Bank for seventeen years and its chief acting officer, testified (Rec. p. 167, Qs. 650, *et seq.*):

That the Abie State Bank did not know of the filing of the suit in its name until the president was so informed by some person who had heard the fact stated over the radio; that he was willing to have it continued inasmuch "as it was already filed"; that he had received a circular stating that 100 or more banks had joined in the filing of the suit and if his bank wanted to join all right and if not all right; that it joined in; that he had never read the petition filed in the case and did not know its contents.

That Abie is a town of 200 people, located in Butler county; that the bank has capital of $15,000 and surplus of $2,500; that it was organized in 1904 with $10,000 capi-

tal and started paying dividends after the first year; that the capital was increased from $10,000 to $15,000 in 1917 *from the earnings, that $5,000 was added to the surplus from earnings*, $1,000 in 1920, $500 in 1921, $500 in 1926; that the bank declared dividends of 10 per cent and sometimes 15 per cent per annum after he went in as an officer in 1912; that he owned 112½ of the 150 shares of stock of the bank; that annual dividends continued to be paid up to 1921 and then ceased until 1926 when a 6 per cent dividend was paid; that the officers did some land and insurance business and paid the proceeds therefrom, which was small, into the bank.

No evidence was offered on the trial as to the loans and discounts of the Abie State Bank, or the rate of interest it received on loans. No statement of its assets and liabilities, nor any other evidence was introduced to show what percentage of its assets were productive or "frozen" and non-productive. No evidence was offered that its condition had been normal during the last several years. It affirmatively appeared, however, that it had a number of notes criticised by the banking department, made by relatives of officers, amounting to more than $1,000.00 and that it had an equity in a real estate mortgage taken from a brother-in-law or brother, of the managing officer. Mr. Svoboda (Rec., p. 174, Qs. 801-5).

Mr. Svoboda testified further (Rec., p. 175, Q. 762):

That for the six months ending June 30, 1928, the bank had gross earnings of $6,860.13, of which $332.10 was real estate and insurance commissions; that it disbursed to salaries, $1,590.00; interest on borrowed money, $115.50; interest on deposits, $3,972.50; taxes, $157.08; Guarantee Fund $596.24, and other expense, $425.80; that for the six

months ending December 31, 1928 (Rec., p. 174, Q. 744), the bank had gross earnings of $5,343.55, of which there was derived from interest on loans, $5,088.36; commission on farm lands, $106.71; commission on insurance, $118.58, that of this amount there was paid in salaries, $1,590.00; interest on deposits, $1,834.88; Guarantee Fund, $61.88; other expense, $1,439.75; and that the net profit for the year was $317.05, after charging off bad debts of $690.70.

It will be noted that its gross income for the year was $12,206.68, of which $5,707.38, or almost 50 per cent, was paid as interest on deposits; and the bank paid more than 25 per cent of gross receipts as salaries.

Mr. Svoboda further testified that the surrounding towns were strong competitors for deposits, the town of [illegible] being within four miles of Bruno, where there are two banks, six miles of Linwood, where there is one bank, and within nine miles of another town, where there is another bank (Rec., pp. 174-5, Qs. 749-58).

The deposits at the end of 1928 were $182,000.00 (Rec. p. 173, Q. 739). The bank was paying interest on so large a percentage of its deposits that it amounted in the aggregate to an average of more than three per cent on all the deposits, a condition manifestly due to competition. Had the bank paid the full Guarantee Fund assessment, it would have been about nine cents on the dollar of its gross income, which is the same relative proportion paid by the other banks of the state.

Mr. Svoboda further testified that his bank had had county deposits continuously from 1912 down to July, 1928, without giving any bonds therefor; after the commencement of the suit, they had given a bond; that he stated to his

depositors that they were protected by the Guarantee Fund (Rec., p. 184, Qs. 839-42).

The Abie State Bank was one of the banks joining in the state-wide Omaha Bee advertising herein referred to. Its name headed the list of banks on the last advertisement.

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30. **A comparison with national banks in Nebraska as to earnings and losses:**

National banks have declined one-fourth in number; their increase in deposits has not been comparable to the state banks; fifty have converted into state banks.

In recent years the percentage of earnings of national banks has been approximately one-half that of the state banks and the percentage of losses almost double.

In connection with the progress of the state banks during the period of the Guarantee Fund Law it is important to note the history of the national banks during the same period, in number, earnings and losses.

It appears that the number of national banks on October 1, 1909, was 219, and on June 30, 1928, 158; a decline of more than 25 per cent (Rec., p. 397, Qs. 2358-60). During the same period there had been a net increase of state banks (Ex. 10, Rec., p. 422).

Since the Guarantee Fund Law became operative in 1911, 50 national banks have been converted into state banks, two of which were in the year ending June 30, 1927. On the other hand, while some state banks were converted into national banks before the law became operative,

only nine have converted from state to national banks during the period that the fifty banks were converted from national into state banks (Rec., p. 396, Qs. 2348-9).

From 1911 to the close of 1927 deposits of state banks increased from $73,886,000 to $261,311,000 (Ex. 10, Rec., p. 422, also in this brief) while national banks increased from $83,360,000 to $193,621,000 (Rec., p. 397, Q. 2356).

Thus while the national and state banks increased their deposits 353 per cent during the period, national banks increased theirs 232 per cent.

Appellants seek to make some point of the amount of deposits per bank, but of course, the important consideration is the total deposits in each class of banks and the relative growth.

John Flannigan, a well known banker, former president of the state association, denationalized within the last three years; Phil Hall, present president of the Nebraska Bankers Association, Greenwood State Bank, denationalized in the last three years; both on account of the Guarantee Fund (Rec., p. 257, Q. 1319). Minick Crawford, former president of the Bankers Association, Crawford, Nebraska, also denationalized (Rec., p. 278, Qs. 1441-2). The list of nationalizations included two past presidents of the Nebraska Bankers Association and the present president (Rec., p. 279, Qs. 1444-5).

EARNINGS. The *slump* of national bank net earnings during the deflation period in Nebraska, was greater than that of state banks, *and shows strikingly that the Guarantee Fund minimized the loss of state banks rather than enhanced it.*

During the period from 1922 to 1928, inclusive, the national banks of Nebraska outside Lincoln and Omaha earned annually an average of 2.74 per cent, or less than 3 per cent net on their capital and surplus, and during the last five years averaged only 2.01 per cent per annum (Compilation from comptroller's report, *plaintiff's* Exhibit 56, page 910, vol. 4, Orig. Rec.; omitted in printing).

A striking comparison with the earnings of state banks for the year June 1, 1925, to June 30, 1926 (Exhibit 39), and for the 18 months ending June 30, 1928 (Exhibit 38).

LOSSES. That the national banks took larger losses in Nebraska through the deflation period compared to the average of the balance of the United States and about double the percentage of Nebraska state banks is indicated by a comparison of the losses of state banks hereinbefore given and the losses of national banks on *plaintiff's* Exhibit 56 from comptroller's reports.

THE LOSS OF NATIONAL BANKS (EX. 56, VOL. 4, PAGE 910, ORIG. REC.):

Per Cent Net Losses to Gross Earnings

	Nebraska	Lincoln	Omaha	Total U. S.
1921	6.2	11.7	16.1	12.8
1922	12.4	14.4	18.4	14.1
1923	10.1	12.9	20.6	10.4
1924	20.2	—0.7	32.5	10.5
1925	17.2	6.7	14.0	9.0
1926	19.3	11.2	19.4	8.5
1927	18.5	13.0	22.3	8.7
1928	12.7	13.3	5.8	8.7

The year 1921 in Nebraska indicates the normal losses; then, as in state banks, comes the peak percentages through 1924, 1925, 1926 and 1927, with a recession in 1928.

Especially note that the percentage of net losses to gross earnings of national banks in Nebraska in 1926 was 19.3 per cent, and 1927, 18.05 per cent, and that as against this, the percentage of gross charge-offs or bad debts by the state banks of Nebraska for the 18 months, including the entire year 1927 was $2,233,968 out of gross earnings of $23,977,661, or at the rate of approximately 10 per cent of gross earnings. In other words, the losses in national banks were approximately twice what they were in state banks and the loss in national banks was almost equivalent in percentage to the charge-offs in state bank, plus the payments to the Guarantee Fund. The stabilizing influence of the Guarantee Fund was effective.

The losses of national banks in the Kansas City Reserve District as compared with the United States as a whole is further shown by data from page 877, Federal Reserve Bulletin for December, 1928 (Exh. 60, Orig. Rec. p. 912-a), and data from page 879, same exhibit; only partially printed in record):

	Losses on Loans per $100 of Loans	Loss on Investments per $100 of Investment
Kansas City District		
1928	1.12	.33
1927	1.57	.39
All Member Banks		
1928	.52	.40
1927	.53	.40

A comparison shows that the Kansas City District on its investments—bonds—runs lower than the averages. The substantial purchase of bonds is a recent development in this agricultural country. The losses on loans in the Kansas City District appears double and treble the averages in the country as a whole; another evidence of deflation.

A striking drop appears in the year 1928; further confirmation that in national as well as in state banks, the deflation losses have been practically eliminated.

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31. **The relatively small amount of the annual Guarantee Fund assessments through the years; no special assessment levied in each of seven years.**

The law as originally enacted and as held valid by the United States Supreme Court provided for regular assessments of one-tenth of one per cent and maximum special assessments of one per cent on average deposits. *The bankers of the state procured legislation in 1923, cutting the authorized assessments practically in half by reducing the maximum special assessment to one-half of one per cent.*

The maximum special assessment that this court now has under consideration is exactly one-half of the amount held valid by the Supreme Court of the United States.

There is included in the printed record an exhibit showing a list of the regular and special assessments, the rate, total assessment and the average deposit for the years 1911 to 1928, inclusive (Rec., p. 487, Exh. 44).

Then the act was amended at the instance of the banks to reduce the maximum special assessment from one per cent to one-half of one per cent. Since the amendment of the act only five-tenths per cent special assessment could be levied in any one year.

It is worthy of note that for the nine years, 1919 to 1927, inclusive, including the three years above when the largest amount was levied, the average special assessment for the

nine years was five-tenths of one per cent ($500 on $100,000 of deposits), and that for the four years 1924 to 1927, inclusive, the average special assessment was .045 per cent ($450 on each $100,000 of deposits).

During the eighteen years from 1911 to 1928, both years inclusive, and including the last unpaid assessment now in controversy, the average assessments for the period, including *both regular and special*, have averaged less than four-tenths of one per cent ($400 a year per $100,000 of deposits): to-wit, sixty-nine-tenths for the eighteen years and less than a million a year for the period.

AMOUNT AGAINST EACH BANK OF THE SPECIAL ASSESSMENT IN ISSUE. The interveners offered in evidence Exhibit A, Record, page 568, showing the amount of the current enjoined assessment assessed against each bank listed in Exhibit A attached to plaintiff's petition.

We challenge the court's attention to this exhibit as showing how small, relatively, is the amount to be paid by each bank.

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32. Threats of the banks to liquidate or nationalize.

The argument that certain banks will possibly liquidate or nationalize affords no reason for judicial nullification of the law. The court is asked to take into consideration and speculate as to the effect thereof. There is no evidence on the proposition. This same threat was made at the time of the enactment of the law but a very few banks did withdraw. But that question is not in this case.

Mr. Schantz on cross-examination testified that he was unable to name any strong state bank that would nationalize or any state banks that would liquidate if the assessments were continued (Rec., p. 637, Qs. 4158-60). He refused to express and had no opinion as to when such assessments would have that effect (Rec., p. 637, Q. 4161).

A fair consideration of this matter, if the same were pertinent, would involve broad and extensive evidence as to the advantages and disadvantages of the national and state banking systems, and an appraisal of the various benefits attaching to a state banking charter as distinguished from a national. There are many advantages attached to a state charter as distinguished from a national one. Some of these are statutory of which the court will take judicial notice. Among these are: A national bank is required to keep a certain percentage of its deposits with a federal reserve bank without interest. A state bank is not under this obligation; it gets interest from its depository. A state bank may loan to one borrower 20 per cent of its capital and surplus; a national bank only 10. A state bank can make individual loans to its customers as large as a national bank with twice the capital.

These and other benefits and advantages the legislature conferred on state banks in imposing the Guarantee Fund obligation are illustrative of the impossibility of a court judicially inquiring into and passing on the matter. Manifestly an inquiry into the matter of the continuance of the Guarantee Fund Law involves an inquiry into all related matters and the law as a whole.

Such threats are no more competent now than they were twenty years ago, at which time they were made freely.

Take the case of these unorganized thousands of claimant depositors; men and women who trusted these banks; believed their representations; relied on the decision of the Supreme Court of the United States; men and women who respect their own legal and moral obligations; depositors in the plight of Rev. Peterson and the stipulated witnesses. On what tenable theory of law or equity or good conscience can they thus be judicially deprived of such percentage of relief as the assessments to be paid by go banks in the system will afford?

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33. The "Eight Per Cent of Capital" Deception.

The banks have adopted as a slogan in this case and constantly reiterated the misleading statement that they pay eight per cent tax on their capital to the Guarantee Fund. They pay nothing on their capital to the Guarantee Fund. The Guarantee Fund payment is an expense of operation, a charge against operation and for the privilege of doing business as a bank. It is no more to be figured as a per cent on capital than is any other expense of operation.

For instance, take the analysis of operating expense and income of the banks for the year ending June 30, 1926 (Exhibit 39). This shows that of each dollar of income of the banks there was paid to the Guarantee Fund nine and eight-tenths cents, or about one-eleventh of the income and that there was paid as salaries and wages 23.90 cents out of each dollar, or approximately one-fourth of all income. Inasmuch as the salaries and wages amount to about two and one-half times the contributions to the Guarantee Fund it would be just as relevant and reasonable to state that the banks paid twenty per cent of their capital as wages

and salaries as to say that they paid eight per cent of their capital as contributions to the Guarantee Fund. The same illustration will apply and the same figures hold good with respect to interest on deposits on savings accounts paid by the banks and which amount to more than five times the payments to the Guarantee Fund. With the same reasoning they could state that they paid forty per cent on their capital as interest on deposits and savings.

These assessments are an expense of operation; a charge against earnings for the privilege of doing business as banks, *and largely and actually come out of the earnings which the Guarantee Fund itself creates.* The annual gross income of the banks is approximately the same amount as the capital (Exh. 39). The banks pay from nine cents to ten cents out of each dollar of gross earnings to the Guarantee Fund.

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34. The assets and liabilities of the Guaranty Fund; and its aggregate net liabilities; there was no concealment of amount; the bankers' knowledge was greater than that of depositors; extent of knowledge immaterial; the amount adds nothing to the maximum permissible annual assessment against the banks; it affects only the claimant deposits; no interest is paid on claims.

It appeared at the time of the trial that the gross book value of the assets in the hands of the Guarantee Fund Commission was $39,511,701. The liability in receivership banks was fixed but the liabilities in commission—operated banks and the probable realization on their assets was a matter of estimate. The evidence fairly disclosed that the net liabilities would be less than $12,000,000.

Secretary Peterson of the Guarantee Fund Commission made an estimate of net liabilities of $16,000,000 in his statement prepared for plaintiffs (Rec., p. 122, Exh. 1).

His cross-examination thereon, however, developed:

That he omitted the asset of stockholders' liability (Rec., p. 120, Q. 316), which in a previous statement he had included and expected a realization on, of 25 per cent; the experience of his department showed a realization of 20 per cent on such assets (Rec., p. 114, Q. 268); this realization would be more than $1,000,000 as the assets in the hands of the commission were much larger than at the date of the previous statement. In this Exhibit 1 he admitted he listed the item of "sale assets" at about half their value (Rec., p. 95, Qs. 112 to 118, inc.).

The assets on hand (book value) had increased from $28,700,000 to $39,500,000 between his statement of May, 1927 (Rec., p. 126, Exh. 4), and his statement of December 31, 1928 (prepared for the trial), (Rec., p. 122, Exh. 1); still he placed the expected realization at the same amount in each, to-wit, approximately $10,000,000. In the latter statement Mr. Peterson did not disclose that $2,239,691 of the assets listed in said Exhibit 1 were cash until he was recalled to the stand and specifically asked the amount of money therein (Rec., p. 196, Q. 916). Of the $39,000,000 listed as gross assets of which he expected a realization of only 25 per cent or $10,451,932, approximately one-fourth of said realization was already in cash and $17,000,000 of the $39,000,000 of assets was in going banks, being operated by the commission (Rec., p. 122, Exh. 1.). In referring to Exhibit 1 it should also be noted that the number of banks is duplicated and that 70 banks in which there were "sale assets" are the same banks included in the other banks listed (Rec., p. 99, Qs. 145-6).

However, the aggregate net liabilities primarily concerns the depositor in a failed bank, for it affects the time when, and the extent to which he will receive his money; it does not increase the bank's annual assessment or contribution for that is fixed by law.

The regular and special assessments approximate $1,600,000 per annum and would pay this liability in about seven and one-half years.

As showing the comparative value of the Guarantee Fund, it appeared that the total liabilities of all failed banks since June 30, 1914, had been $75,650,933 and of which $50,000,000 had been liquidated and paid; 70 per cent having been paid from the assets of the failed banks and 30 per cent from the Guarantee Fund (Rec., p. 121, Qs. 320-4) leaving, roughly, $26,000,000 of liabilities as against which there are the assets of book value of $39,031,605.

CAPITAL ASSESSMENTS ON STOCKHOLDERS. Comment is made by appellants on the fact that $2,000,000 of capital assessments have been paid by stockholders. There is not the slightest evidence that the cause for these payments was in any wise related to the Guarantee Fund assessments; on the contrary the evidence hereinbefore quoted was that the Guarantee Fund had been a stabilizing influence and prevented losses and the inevitable conclusion is that but for the Guarantee Fund the banks in which these capital assessments were collected, being weak by reason of losses, would many of them have failed or had runs on account of their apparent weakened condition. As one witness expressed it, it was common knowledge that under the operation of the Guarantee Fund law and

through the period of stress a bank on one side of the street could fail and close without causing the slightest embarrassment to the bank on the other side because of the confidence in the fund (Evidence hereinbefore quoted).

INTEREST ON LIABILITIES. In line with plaintiffs' policy of exaggeration they say it will take the assessments to pay the interest on the liabilities.

The interest on adjudicated claims, if paid, would be *less than one-half the amount thus extravagantly stated, and the same claimants would get it*, and in the same proportion, and benefit thereby in the same amount as if it were paid as principal.

But, quite important, the guarantee fund has not been paying, nor the depositors asking, interest except in a few isolated litigated claims reaching the supreme court, as was testified to. In fact adjudicated claims were paid up until October 1, 1927, and those now unpaid have been allowed since from that time down to the time of the trial (Exh. 54, p. 820, vol. 4, Orig. Rec.)

Again, if the item of interest becomes important, it is within the power of the legislature to provide that all assessments paid shall apply on principal of deposits.

Reference is made in the governor's message to accrued interest on certificates of deposit, and accrued interest on liabilities of the guarantee fund. The reference to accrued interest on certificates of deposit had reference to that accrued at the time the bank went into receivership, as of course no interest is allowable on deposits while a bank is in receivership and pending adjudication; it is *in custodia legis*.

KNOWLEDGE OF EXTENT OF LIABILITIES. Appellants state their lack of knowledge of the net liabilities of the Guarantee Fund. Failed banks have been under the control of the Guarantee Fund Commission since 1923, and it has operated a large number of banks taken over. The members of the Commission are appointed by the governor from names chosen by the state bankers.

Mr. Kirk Griggs, secretary of the Department of Trade and Commerce in 1925 and 1926, testified: That about January 20, 1925, he had a meeting with Mr. Schantz and other representative bankers in Lincoln and that he had made a resume of conditions and asked them their advice and he told them that he "figured the losses then existing payable out of the Guarantee Fund would amount to over $6,000,000 (Rec., pp. 650-1, Qs. 4226-32) and that he meant net losses (Rec., p. 653, Q. 4241); and he told them that in his judgment the number of banks probably involved would amount to 215 (Rec., p. 652, Q. 4233).

In May, 1927, the bankers' committee met in Lincoln and an estimate was made at that time of the assets and liabilities; the assets then being $28,720,257 and it was estimated that the net loss would be over $6,000,000 (Rec., p. 126, Exh. 4).

As will be noted, the amount of the net liability of the fund from time to time is a matter of opinion, largely based on estimate and value of assets. The book value of the assets of the fund has at all times been vastly in excess of the liabilities. At the time of the trial the book value of the assets of the Guarantee Fund was $39,000,000 and the liabilities about $26,000,000. So the net amount was a matter of judgment as to realization on assets.

At the time the advertising was done in 1926 the bankers apparently then knew that the net liabilities of the fund were in excess of $7,000,000.

In March, 1928, Mr. Schantz prepared and circulated two thousand copies of a pamphlet concerning the Guarantee Fund Law (Rec., p. 627, Qs. 4096-4105). He quoted in this document "The Story No Other State Can Tell". He therein referred to the total net liabilities of the fund as ten million dollars and recommended a system of paying the depositors with receiver's certificates in order to make the claim available as security for loans and give the depositors the use of their deposits. There was then no question about ability of the banks to pay assessments, or of repudiation of liabilities or of diminishing benefits.

Mr. Bliss, a state banker, has been in active charge of the banks. There is absolutely no evidence that either Secretary Bliss or Secretary Peterson deceived the bankers, or anyone else, in the premises. But of course the extent of the losses and the character of liability cannot under any proper theory of the law be a basis for the banks denying liability for the fixed maximum assessment.

Plaintiffs state: "Estoppel must be based on acts performed by one party with knowledge to the detriment of another party having no knowledge or means of knowledge." To support this statement they argue voluminously as to the time when they ascertained the liabilities of the guarantee fund.

They had knowledge in fact; but the knowledge or lack of knowledge apparently cuts no figure in the principle applicable.

The aggregate of the net liabilities did not add anything to the permissible assessment against the banks. It merely went to the question of the time when and the amount of the payments on accrued claims. It chiefly concerned the claimant depositor.

Certainly, there is no evidence that the depositors knew anything about the extent of the liabilities.

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35. The alleged conversational guesses as to future losses and failures; and possible future losses as indicated by statements in Examiners' Reports.

Much time was devoted by appellants to a cross-examination of Mr. Bliss, secretary of the Department of Trade and Commerce, with reference to what he might have theretofore said in conversation with their Witnesses Stevens and Schantz with respect to the number of banks which might have capital impairment and might thereafter fail, and to Stevens and Schantz recollection thereof. Mr. Bliss did not recall making the statements. Appellants have picked out a few isolated questions and answers from this testimony. A fair analysis of such testimony would require its quotation here verbatim. We will not burden this brief with it.

We submit that such testimony of conversations was wholly incompetent. If held competent for any purpose they would not be binding upon the banks from any angle and would not be binding upon the depositors. Manifestly such expressions of opinion if made as to what could or might happen would have slight weight. Mr. Bliss explained it all by his statement that anything he might have said had reference to his estimate as incorporated in the bankers' committee's report of May, 1927, that after that report 100 banks had been closed; that other banks

had taken care of their losses by assessment or otherwise (Rec., p. 192, Q. 898), and that at the time of the trial nearly all the banks that he had referred to in said report as having probable capital impairment had been cleaned up and disposed of in some way (Rec., p. 198, Q. 934).

As a matter of fact, the testimony of Mr. Bliss and all other witnesses as to facts and figures on earnings, condition, etc., negative the probability of his ever having made any such a statement. Manifestly, an isolated statement of that character, if made in a conversation, would have no substantial evidential value in any event and should have no prejudicial bearing on the rights of depositors.

Analogous are the statements of Mr. Stephens and Mr. Schantz that they thought if the assessments were continued the majority of the banks would operate with impaired capital or be forced into liquidation. Neither of them gave a single figure that would support such a guess. In fact, the acts, conducts, representations and statements of each prior to the trial had been just the reverse of such a position.

Examiner's Estimates of Probable Losses in Going Banks

Long after the plaintiffs had rested their case they asked Mr. Marshall of the banking department to run on an adding machine from examiners' reports made from time to time during a fifteen months period, the total amounts noted by the examiners as losses and probable losses, the amount of loans and discounts in all the banks six months due and demand paper carried twelve months or more. This was done. Appellants stress such figures; but do not include the related facts.

It appeared that none of these examinations had been made at the same time nor for the same period. Some items objected to by the examiners had been collected in or otherwise removed; some of the objections were disputed by the banks. The criticized items were distributed through the state banks without reference to whether the bank was strong or weak, dividend paying or non-dividend paying (Rec., p. 559, Qs. 3608-9).

Mr. Marshall testified that in the case of the notes six months past due and demand notes carried 12 months or more, it was merely a classifying and the question of whether they were good or bad did not enter in (Rec., p. 560, Qs. 3615-7). Plaintiffs had referred to these as "statutory bad debts."

There was no foundation for the introduction of the totals from these examiners' reports and they should not have been admitted without an opportunity to examine them and cross-examine in detail with reference to them. The total amount thereof based on the total loans and investments of $216,342,687 was 1.82 per cent (June 30, 1928, statement, p. 664, Record). As stated, testimony of Mr. Bliss was offered that more than one-third of this had been disposed of. It was further testified to that many of the items were not admitted by the banks to be loss or probable loss.

Having in mind the commendable disposition of examiners to closely scrutinize and criticise with a view to keeping the banker diligent in the matter of his loans and discounts, we think it is a fair statement that the percentage of items criticised as above would prevail under any conditions in the banking business. The strong banks get the criticisms as well as the weak.

We submit this evidence was entitled to little probitive force on the issues. The trial court in its opinion did not refer to it.

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36. The benefits of the law to the banks—past and future; the courts can not measure them.

The evidence is overwhelming and not denied as to the benefits of the Guarantee Fund to both depositors and banks. The only reason suggested by the plaintiff as to why it would not be of a continuing benefit was its large liability. This the banks urge by way of argument rather than by way of evidence. The public does not urge it; the public authorities do not assert it. The extent of the liabilities did not add a dollar to the maximum $600 per $100,000 of deposits annual payment of assessments by the banks.

The banks admit past benefits *to them* from the Guarantee Fund. The evidence of impaired benefits now is scant. They raise it by inference and imply it from the amount of the accrued liabilities of the Fund; this is a matter of argument and is covered hereafter. It is in evidence that the acts of the banks in giving notice of their intention to file, and the filing of this suit was the disturbing factor. It is the only tangible evidence of reduced confidence.

Inasmuch as the Guarantee Fund provisions were created *for the benefit of depositors* the benefits to the banks necessarily arise indirectly although, as has been herein shown, there were large benefits to the banks. Manifestly, *the extent of the benefits to depositors* in the past has not been at any time a matter for judicial computation and

is not susceptible to judicial measurement. In considering the present and future the court is asked to nullify the law on the ground that it has ceased to be beneficial to the depositors in existing banks and to the banks. We submit that the future benefits of the law to the depositors or the banks cannot be judicially measured or ascertained. No authority has been or can be produced supporting such course.

The fact of whether the fund has accumulated liabilities has two effects; it affects the time within which depositors in failed banks will receive payment, and it no doubt diminishes some the extent to which a present day depositor relies on the protection of his deposits. But it adds nothing to the maximum assessment to be paid by the banks. If the liability of the bank was unlimited a different question might be presented.

If the law is for the benefit of depositors in failed banks it would seem absurd to contend that they should forego their claims because of the extent of the claims arising. They are not responsible for that situation.

Appellants contend that the fund is for the benefit of existing depositors in going banks. *It is of course for the benefit of all depositors.* From the depositors in going banks today trusting in and relying on the law, its adjudicated validity and the express and implied promises of the banks, come the claimant depositors of tomorrow—including public officials with unsecured public deposits. Such are the claimant depositors as now exist in many thousands—public and private.

Claimant depositors are the only ones that have occasion to actually participate in the fund or opportunity to participate in the assessments levied and now enjoined; in that sense the depositors are the real defendants; in that sense they avail themselves of its protection.

At the time this suit was started, there were depositors' adjudicated claims of $10,536,518.59 (Rec., p. 87, Qs. 56-7). The annual regular and special assessments of $6 per $1,000 of deposits produces annually around $1,600,000, which is equivalent to 15 per cent of these adjudicated claims.

In determining the benefits of the guarantee fund law, relatively, at any stage, as between depositors who had become claimants through failure of banks and the depositors in going banks, the benefit to the former is the more tangible and visible, and definitely ascertainable. This is necessarily so. Only a portion of the depositors in going banks ever become claimants against the fund. The depositor in a going bank places reliance on the fund to the extent of depending on the measure of security which the assessments will give in the event that he is added to the existing claimants.

This benefit to the depositor in the going bank or in the closed bank is not in the same degree that it would be if the Fund had no accrued liabilities. But the depositor in the going bank has exactly the same benefit and protection as the depositor in the failed bank, in that he knows that should the bank fail, he will participate *eo instanti* in the depositors' guaranty fund.

The enjoined assessment for the last half of 1928 was $622,947.76. The regular and special assessments since then amount to less than $2,400,000, none of which the banks have paid, so that the total assessments now in issue are little less than $3,000,000. The banks have accumulated the same in their hands pending the determination of this suit.

37. The bringing of this suit by the banks and their attempted repudiation of their liability has impaired public confidence in the banks; has been the principal source of reduced benefits from the Guarantee Fund and has resulted in bank failures.

The State Bankers Association meeting was held in Omaha, Nebraska, in November, 1928, and the newspapers carried the report that certain state banks would contest the assessment and refuse to pay it. The president of the association announced that the banks were not going to pay the assessment. The banks thereafter did commence a suit and the agitation, including the suit, created nervousness and distrust in the people (Rec., p. 285, Qs. 1486-90; Rec., pp. 469-70, Qs. 2862-3).

Thereupon public officials commenced to demand bonds and in December, 1928, about the time the suit was filed, State Treasurer Stebbins learned of the proposed contest of assessments and as he stated, he "played safe and asked for bonds" in the latter part of December, 1928 (Supp. Rec., pp. 60 and 61); public officials also had commenced to ask for bonds insuring public deposits (Bliss, Rec., pp. 469-70, Qs. 2862-3).

Appellants have gone outside of the record and stated the alleged number of banks that have failed in 1929 and 1930; the number is grossly exaggerated; and the bank

failures that have occurred are largely attributable to the bringing of this suit. Reference to Exhibit 10 will show that the banks, through the period from 1920 to 1928 held their deposits substantially intact, notwithstanding the large number of failures. Whatever losses they have suffered since the bringing of this suit are solely attributable thereto.

There is no evidence of any diminution in the benefit of the law to them until they precipitated this controversy. Until then the depositors in failed banks had confidence in them; and the depositors in going banks gave no evidence of impaired confidence.

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38. The alleged "Public Interest" asserted by the banks is but the camouflage of the large state banks; they only sponsor this suit; the defendants' public officials are asserting the public interest.

39. Messages of the outgoing and incoming governors are in harmony with the statements of this brief.

But, say the banks, these liabilities having accrued to claimant depositors of failed banks, the present-day depositors in going banks will receive no future benefit and the payment of existing obligations will affect the public interest and decrease the ability of the banks to meet their obligation to present-day depositors and to make compensatory earnings. Thus hiding under the cloak of the public interest and that of the present-day depositors, their asserted grave concern for both is purely camouflage to increase their own earnings at the expense of the depositor.

Appellants have quoted a few isolated excerpts from the inaugural address of Governor Weaver. That both Governor Weaver, the incoming governor in January, 1929, and Governor McMullen, the retiring governor, held views wholly in harmony with the position of appellees in this case is shown by the following quotations from their respective addresses on that occasion.

Governor McMullen, in his farewell message to the 1929 legislature, in concluding his reference to banking conditions and these assessments, said (Exh. 11, Senate Journal, p. 197, vol. II, Orig. Rec.):

> "So long as these bank losses remain unpaid, the guarantee law should not be repealed and its provisions should be protected from nullification. Depositors of failed banks are legally and morally entitled to their money. They have taken the word of the banks that their deposits would be secure and they have depended on the integrity of the state to see that the guarantee laws are carried out in good faith."

And prior thereto, in the course of the address, he had stated (pp. 42-43, vol. II, Orig. Rec., Senate Journal):

> "When the bank guarantee bill was under discussion by the legislature of 1909, the point was stressed that only the small depositor, such as the day laborer, the widow with her meager savings, and similar accounts, should come under its provisions, but as the bill passed it included all deposits of whatever size or kind. According to available records, the measure met the opposition of three-fourths of the state bankers. Counsel was retained by opposing bankers and the constitutionality of the law tested in the federal supreme court. The law was sustained by that body in a decision rendered in 1911 and state bankers have

paid their assessments as levied annually until the second half of the special assessment for the year 1928 just closed. On December 21, 1928, notice was served on the state that payment of the special assessment mentioned would be resisted and a restraining order asked of the courts on the ground that the assessment is confiscatory. While many state bankers opposed the law when it was first enacted, there were others who engaged in the banking business because of the law and in spite of the payment of assessments for nearly a score of years have been benefited to the extent that their banks have grown into large and substantial institutions. During the years of the development of their banks under the guarantee law, they were outspoken advocates of the [illegible] and protective features of the measure and emphasized the advantage to the depositor in having his account secured. However, when banks to [illegible] increased in number and losses to the guarantee fund grew in volume, it was the larger banks, those that formerly had extolled the law, that first protested against paying their proportion of the special levy and proposed to other state bankers that organized effort be made to have the special assessment feature of the law declared null and void. These protestants assert their willingness to pay the regular assessment, which is one-tenth of one per cent, but are anxious to be relieved of the special assessment, constituting five-tenths of one per cent. If the courts hold the special assessment unconstitutional and the regular assessment is not increased to make up for it, the guarantee law is doomed.

"In 1909, before the guarantee law was in full operation, the 659 state banks reported $71,000,000 of deposits with a capital investment of $12,000,000. In 1920 with 1,012 banks reporting there were $213,000,000 of deposits with a capital of over $26,000,000. In 1928 from the latest compiled reports of the 730 state banks there are $268,000,000

of deposits with a reserve in cash and bonds of over $97,000,000 and a total capital stock of $19,000,000. In other words, 273 fewer state banks in 1928 than in 1920 and $7,000,000 less capital investment, the deposits have increased $20,000,000. The low reserve position of the banks of 1920-1921 compared to the large volume of deposits has been completely changed. The banks now show cash and bonds of $97,000,000, which when added to their commercial and feed lot loans, should enable the average state bank to pay one-half of its deposits practically on demand. Excluding the sixty-one banks in receivership and the seventy-four banks in the hands of the guarantee fund commission, together with an estimated number that may be taken over in the future. It may be said that the remaining banks are stronger, more prosperous, more elastic and more able to meet demands than any time in the history of the state."

Governor Weaver, in his inaugural message to the 1929 legislature, and in commencing his reference to the state banks and the guarantee fund said Exhibit 11, Senate Journal (p. 197, Orig. Rec.):

"Both the republican and democratic state platforms declared in opposition to the repeal or weakening of the bank guarantee law. Regardless of either the merits or defects of the law, and the guarantee system thereunder, general assent as to its need and usefulness has been given by our people for more than seventeen years. Undoubtedly the protective purposes and features of this agency accepted by the people until recently as adequate, have served as a great stabilizing influence in both the banking and other business of the state, and especially during the adverse financial conditions of recent years. During this trying period the benefit to all business was so apparent that I feel sure that the business of the state could well have afforded and would have been willing

> to have generously contributed to sustain the guarantee fund, had its solvency been then threatened. In view therefore of the expressed opinion of both political parties in this state and of the recognized benefits which have already accrued, we should seek only legislation pertaining thereto which aims to strengthen and protect the bank guarantee system. Our joint efforts in this public endeavor should be undertaken in spirit entirely free from partisan bias, and for the sole purpose of serving the state and its people."

Governor Weaver, in a special message to the 1929 legislature, on February 4, 1929, of which the court takes judicial notice, said that since his inauguration message, conferences had been had with committees of both houses, as well as with many citizens; and said among other things in discussing banking and the guarantee fund:

> "In taking stock of this whole situation, our officials and citizens should be firm in meeting the attack made upon our present laws by a large number of state banks. The operation of banks under the laws of Nebraska is based on a franchise right granted by the state. A corporation which has sought, obtained, and used such a franchise cannot be heard to assert that it will keep only a part of the contract. It must always operate under the laws of the state whatever they are. Any modifications as to the present law should be made, not because modifications are demanded by the banks, but because the interest of the state will be better served thereunder. Until we go to a new basis for the new guarantee fund, the present rate of assessment should stand."

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40. **The Nebraska legislature, in March, 1930, after the decision in this case, passed an act reducing the future total annual assessments from six-tenths of one per cent**

to two-tenths of one per cent, and limiting the latter to a period of ten years, and to application on accrued liabilities (Sen. File No. 3, 46th Spec. Ses.).

We can not in this case consider the reasons which prompted the Nebraska legislature to take this action in March, 1930, over fifteen months after this suit was brought, nor consider the sufficiency of such reasons. This act and its effect are further discussed under Proposition of Law Number 20.

ARGUMENT AND PROPOSITIONS OF LAW

Cases testing the validity of Guarantee Fund laws have always heretofore been submitted on demurrers to the banks' petitions. Invariably the laws have been sustained. The defendant state officials in this case, however, were of the opinion that the interests of the state and its people would be served best by a complete showing of how untrue and how groundless the contentions of the banks were, as well as raising the legal questions.

In this, we believe, the court will appreciate that Governor Weaver and the other officials were right. The public interests and business interests of the state are better served by a full and complete showing of the facts than by a tacit admission of the groundless economic contentions of the banks, as a demurrer would have done. Even a technical admission of these untrue assumptions and complaints would have been seriously injurious from an economic standpoint.

Upon the trial, as the court will appreciate, the banks failed wholly to show that the Guarantee Fund assessments

ever materially influenced the failure of any bank or that the assessments are now oppressive. A contrary state of facts was conclusively established. We have summarized and quoted the evidence at length in this brief; perhaps too much. But it is in line with the policy of the Nebraska state officials to have the case fully and fairly tried on the facts as they exist and not from a fictitious assumption of conditions.

Appellants by ingenious argument, attempt to submit the issue in this case as one between the depositors with unpaid claims against the Guarantee Fund and present depositors in going banks. They contend that payment of the assessments by going banks is unfair to present depositors because such payment does not give them protection.

This is not a correct statement of the practical issue presented by facts and conditions as they now are and were when this suit was brought.

The true controversy is whether or not the present stockholders in going banks are entitled to have the court by injunction suspend the operation of the Guarantee Fund Law (admitted and adjudicated a proper police measure), until all losses, current and those caused by the deflation period, are charged off, and the stockholders receive larger earnings than the banks were earning (average annual net earnings in excess of 7.12 per cent on capital and 5.26 per cent on combined capital and surplus) before the banks are required to meet their obligations to depositors with unpaid deposits. If relieved of these assessments the stockholders would admittedly, after both current and deflation period losses

are charged off, receive an average annual return of in excess of 11.18 per cent on the combined capital and surplus of their banks.

The Nebraska Supreme Court in its opinion and syllabus sets out in detail part of the evidence showing that the Guarantee Law had been of tremendous benefit to the state banks; that it never has been a materially contributing cause of bank failures; that it is not confiscatory or burdensome and that a complete case of waiver and estoppel was made out against the banks. That court was clearly right on the facts and we believe our full presentation of those facts and the evidence to that court and to this, the highest court of the country, has been the best policy.

PROPOSITION OF LAW NUMBER ONE

Where the legislature has had before it the question of the benefits of a guarantee fund law to the depositors, to the banks themselves and to the general public, and the question of the obligations to be imposed for the public good as conditions to engaging in the banking business, and the legislature under its police power has determined that the good of the public justifies the enactment of the law with its reciprocal benefits and obligations, the judiciary, under the rule applied by this court in the oleomargarine and bank guarantee fund cases, will not undertake to weigh benefits which have been and will be derived from the law against the obligations imposed by it or "to determine whether the law is unwise or unnecessarily oppressive" in its operation.

Powell v. Pennsylvania, 127 U. S. 678.
Sinking Fund Cases, 99 U. S. 700.

Fairbank v. *U. S.*, 181 U. S. 283, 21 S. Ct. Rep. 648.

Purity Extract Co. v. *Lynch*, 226 U. S. 192.

6 R. C. L., section 12, page 12.

Shallenberger v. *First State Bank of Holstein*, 219 U. S. 114, 31 S. Ct. Rep. 189, 55 L. ed. 217.

C. B. & Q. R. R. Co. v. *State*, 170 U. S. 57, 47 Neb. 549.

State v. *Richcreek*, 167 Ind. 217, 77 N. E. 1085.

Lubetich v. *Pollock*, 6 Fed. (2nd) 237 Dist. Ct. W. D. Wash.

Schuake v. *Dolley*, 85 Kan. 598, 118 Pac. 80.

Many elements which must obviously have been of great importance with the legislature in the determination of the provisions and the enactment of the Guarantee Fund law, are not and never could become proper subjects of investigation by the courts. The determination of facts on which the validity and advisability of the adoption and operation of such statutes may depend, is primarily for that body.

The Supreme Court of the United States has steadfastly refused to usurp the legislative functions by attempting to review the questions of fact and public policy upon which a statute grounded upon the police power is based and is operating. The respective advantages to the depositors, banks and public, arrayed against the obligations imposed by the law, present questions of policy for the discretion of the lawmaking body or for the voters at the ballot box.

And the evidence in this case must convince any one who has reviewed it, that the banks' claim that the law

has become oppressive and burdensome, has no foundation in fact.

This court and numerous state courts have adhered to the principle under consideration in all bank Guarantee Fund cases. It is forcefully stated in the oleomargarine case, *Powell* v. *Pennsylvania,* 127 U. S. 678:

> Whether the manufacture of oleomargarine, or imitation butter of the kind described in the statute, is or may be conducted in such a way, or with such skill and secrecy, as to baffle ordinary inspection, or whether it involves such danger to the public health as to require, for the protection of the people, the entire suppression of the business rather than its regulation in such manner as to permit the manufacture and sale of articles of that class that do not contain noxous ingredients, are questions of fact and of public policy which belong to the legislative department to determine. And as it does not appear upon the face of the statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the courts. It is not a part of their functions to conduct investigations of facts entering into questions of public policy merely, and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove its determination of such questions. The power which the legislature has to promote the general welfare is very great, and the discretion which that department of the government has in the employment of means to that end, is very large.

The legislature of Pennsylvania, upon the fullest investigation, as we must conclusively presume, and upon reasonable grounds, as must be assumed from the record, has determined that the prohibition of the

sale, or offering for sale, or having in possession to sell, for purposes of food, of any article manufactured out of oleaginous substances or compounds other than those produced from unadulterated milk, or cream from unadulterated milk, to take the place of butter produced from unadulterated milk, or cream from unadulterated milk, will promote the public health, and prevent frauds in the sale of such articles. *If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine as an article of food, their appeal must be to the legislature, or to the ballot-box, not to the judiciary.* The latter cannot interfere without usurping powers committed to another department of government.

In *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, in an opinion by Justice Hughes, this court said:

> The court has no concern with the wisdom of exercising the police power, and unless the enactment has no substantial relation to a proper purpose, cannot declare that the limit of legislative power has been transcended.
>
> The question is whether the legislature had power to establish it. The exercise of this power, as the authorities we have cited abundantly demonstrate, is not to be denied simply because some innocent articles or transactions may be found within the prescribed class. The inquiry must be whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a mere arbitrary fiat.

In *Sinking Fund Cases*, 99 U. S. 700, it was said:

> Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One

branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule.

In *Chicago B. & Q. R. Co. v. State*, 47 Neb. 549, affirmed by the Supreme Court of the United States in 170 U. S. 57, it was said:

> It is enough that the courts will not interfere to prevent the enforcement of the statutes on account of any mere difference of opinion between them and the law-making branch of the government respecting the wisdom or necessity of particular measures.
>
> Nor is such legislation violative of any contract obligation, since the power to subserve the general welfare of the people by all needful and proper regulations in the interest of health and safety cannot be bartered away by contract or otherwise.

The principle is well stated in *State v. Richcreek*, 167 Ind. 217, 77 N. E. 1085:

> The circumstances that for a time it may inflict hardship, inconvenience, and possibly loss to certain individuals does not amount to a constitutional objection so long as such burdens or losses are not needlessly and unreasonably imposed, but result as an incident of a general enactment fairly designed to subserve the public welfare. If the mere fact of resulting inconvenience and loss to an established business, admittedly subject to public control, were sufficient to preclude control under the police power, then regulation would be practically impossible, and this most salutary and necessary power of sovereignty be seriously abridged or wholly destroyed.

In *Schaake* v. *Dolley*, 85 Kan. 538, 118 Pac. 80, it was said in upholding the bank law of Kansas:

> When once a subject is found to be within the scope of the state's police power, the only limitations upon the exercise of the power are that regulations must have reference in fact to the welfare of society, and must be fairly designed to protect the public against evils which might otherwise occur. Within these limits, the legislature is the sole judge of the nature and extent of the measures [illegible] to accomplish its purpose. It may even go so far as to establish a monopoly. Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394; *Re Leswe*, 54 Kan. 737, 762, 39 L. R. A. 545, 39 Pac. 710.

This issue in the Noble State Bank case, *supra*, was disposed of by the following statement:

> We fully understand the practical importance of the question and the very powerful argument that can be made against the wisdom of the legislature, but on that point, we have nothing to say, as it is not our concern.

If the court were to undertake to review and adjudicate the weight to be given to the various considerations which induced this legislation in the first instance or the economic fairness of its operation as between different classes affected thereby, it would be a radical departure from the attitude heretofore taken by this court on those questions. Omitting for the moment the complete failure of the evidence of appellants, the questions urged are fundamentally legislative and not within the province of the courts.

PROPOSITION OF LAW NUMBER TWO

Where a guarantee fund law is enacted, adjudicated to be constitutional and a valid exercise of the police power,

remains in operation for twenty years while the banks and the general public receive benefits from it and depositors acquire matured, adjudicated claims under it against the fund, if the authority exists at all to divest these depositors of their rights and to relieve the banks from an assessment made and from future assessments on alleged grounds of public need or welfare, it lies wholly with the legislature in the further exercise of the police power; for the matured claims of these depositors acquired while the law was admittedly constitutional and properly operative and while the banks and the public were receiving the benefits of the law, can, because of the rights guaranteed under the constitution, be taken away, if at all, only through the exercise of the police power, which power the courts can not exercise.

Lankford v. *Platte Iron Works*, 235 U. S. 461.

Mugler v. *Kansas*, 123 U. S. 623.

First State Bank of Claremont v. *Smith, et al.*, 19 S. D. 518, 207 N. W. 467.

Thompson v. *Bong*, 251 Pac. (Kan.) 178.

Noble State Bank v. *Haskell*, 219 U. S. 104.

6 R. C. L., Sec. 105, Page 106.

6 R. C. L., Sec. 230, Page 242.

Cooley, Const. Lim. 200, 587, 706 and notes.

Wurts v. *Hoagland*, 114 U. S. 606.

Dartmouth College v. *Woodward*, 17 U. S. 518, 4 Wheat. 518, 4 L. Ed. 629.

Hendrick v. *Lindsay*, 93 U. S. 143.

Meyer v. *Shamp*, 51 Neb. 424.

The Guarantee Fund Law prescribes a contract between the banks and depositors. Practically all deposits involved originated during the past few years and while

the law was admittedly valid and operative. Thousands of these deposits have been reduced to judgment and ordered by the courts paid out of the Guarantee Fund.

These depositors have a vested contract right under the law against the banks of the state bank system. This contract is a valuable property right which cannot be taken or divested by judicial decree.

This court has passed squarely upon the question of the rights acquired by depositors under Guarantee Fund *laws*. *The case of Lankford v. Platte Iron Works*, 235 U. S. 461, was decided upon the proposition that the State of Oklahoma was a necessary party to the suit and could not be sued without its consent. But in a dissenting opinion by Justice Pitney, concurred in by Justices Day, Van de Vanter and Lamar, the unanimous opinion of the court on this issue was stated as follows:

> It is submitted that for the proper interpretation of the statute—or for its construction, if construction be needed—we should observe the fundamental rules that apply to contracts; for while there is disagreement upon the question whether the state is a party to it, *we all agree that the act prescribed a contract, and one of wide importance, between the banks and the depositors, and that the public interest is as much concerned in seeing it carried out and enforced according to its true intent and meaning as in requiring that the contract be made.* Not only has the state obliged the banks to make this contract with their depositors, but in the law it has expressed the terms in which it shall be made. *The courts, therefore, ought by all means to adopt an interpretation such as reasonably would have been placed and presumably was placed upon the statute by ordinary bankers and bank depositors in advance of judicial interpretation;* read-

ing it according to the fair import of its terms, without resort to legal subtlety in order to overthrow or weaken it, but seeking rather to uphold it and give it effect, "*ut res magis valeat quam pereat;*" *and if construction be needed adopting that meaning which the promisor had reason to believe the promisee relied upon in accepting the offer.*

The state banks claim that there is no contractual relation between them and the claimant depositors.

The rule of property pertains in this court and in Nebraska, that a contract between two parties for the benefit of a third, is enforcible for the benefit of the third party either at the instance of one of the parties to the contract or at the instance of such third person. There can be no question about this rule.

Hendrick v. Lindsay, 93 U. S. 143.
Meyer v. Shamp, 51 Neb. 424.

The banks contend, and rightfully so, that their charters and the provisions of the law pertaining to the same constitute a contract between the state banks and the state. This proposition has been recognized ever since the famous Dartmouth College case and is unquestionably the rule in Nebraska. Therefore, we have in this instance, a contract between the State of Nebraska and every state bank in the state, by which the banks under the operation of the law prior to the commencement of this suit, became obligated to pay assessments to a fund for the benefit of these claimant depositors. That contractual right is enforcible by the depositors for their own benefit or by the officers of the state as trustees for the benefit of these depositors.

The contract right of the depositors with matured claims against the state banks is of the same nature as the right of the insured under an insurance policy to demand and receive payment from the insurer. The state banks prior to the institution of this suit continuously represented to the depositors that the Guarantee Fund law was *"like a giant insurance company."* Here was their construction of the rights of the depositors at that time, as published and signed by them in the Guaranty Bill series, "The Story No Other State Can Tell" and other advertising:

> "The purpose of this chapter on the story [illegible] Nebraska can tell is not to discuss this point, however, it is to call attention to the fact that the system that has made this possible is like a great insurance company." (Rec. p. 246, Exh. 8 of Exh. 13.)

> "A *great insurance plan* [illegible] *confidence* and trust because the money in the bank is safe." (Rec. p. 246, Exh. 8 of Exh. 13.)

> "If you put your money in one of [illegible] you will not only receive compound interest but also have *absolute insurance*. One thousand state banks are secured by law for the purpose of protecting your deposits. How can you lose a dollar in the bank by fire, theft or robbery?" (Rec. p. 240.)

In *Farmers State Bank v. Smith* (8 [illegible] 200 N. W. 78) the assessments due from the banks to the Guarantee Fund were held to be similar to "loss payments due from the insurer to the insured."

In its opinion the court said:

> "Treating the depositors' guarantee fund law as an insurance scheme, the assessments are not payments

premiums due from the insured, but in the present state of the fund are loss payments due from the insurer to the insured; payment to the fund being a means of payment to insured depositors who are not appellant's debtors.

The banks' own interpretation of their own obligations and the depositors' rights under the law is entitled to great weight. As said by this court in the Lankford case, *supra*:

> "The courts therefore ought by all means to adopt such an interpretation such as reasonably would have been placed and presumably was placed upon the statute by ordinary bankers and bank depositors in advance of judicial interpretation. * * * * and if conflicting interpretations can be found adopting that construction which the parties themselves seem to believe the promises relied upon in accepting the office."

Appellants cite the case of *Wurtz v. Nestos* (N. D.) 200 N. W. 324, as authority against the holding by this court in the case of *Lankford v. Steele*, *supra*. Analysis of that decision, however, supports the propositions we have been discussing.

The Guaranty Fund Law of North Dakota providing that deposits should be paid in the order the banks closed, was by the legislature of that state amended in 1925 to provide that the commissioner should pro rata payments to depositors in all closed banks without regard to the order of closing. That court held that the legislature of North Dakota had enacted the Guaranty Fund law in the exercise of the police power and that the law could be modified *by the legislature* as against those who had not perfected their claims.

The North Dakota legislature in the further exercise of police power changed the order in which the depositors should be paid from the guaranty fund and to this extent modified the rights acquired by depositors. But no court could divest these rights by judicial decree.

In *Standard Oil Co.* v. *Engel* (N. D.), 212 N. W. 822, cited by appellants, the court held that the Guarantee Fund law properly vested final judicial authority to pass upon claims against the fund, in the commission, although no appeal would lie to the courts from the decision of the commission, and that mandamus would not lie to control the judicial discretion of the commission in passing on claims.

In both of these cases cited by appellants, reference is made by dictum to the nature of the rights of the depositors. Neither of these cases were, however, decided upon that issue and are not authority upon it.

It is urged since the banks at the time suit was brought had an average annual earning of only 5.26% on combined capital and surplus after charging off in 18 months over two million two hundred thousand dollars of current and deflation period losses, that there has been a change of economic conditions which will warrant the court in divesting these depositors of their vested contract rights. This proposition is neither sound in fact nor in law. But if this were a sound economic proposition and if some economic necessity for change did exist, the courts would not for that reason be empowered to divest or diminish these depositors' vested contract rights.

In the case of *Thompson* v. *Bone*, 251 Pac. (Kan.) 178, an attempt was made to invoke court action because the Guarantee Fund Law of that state had large accumulated claims and it appeared that some of the depositors by reason of claims being paid in the order of their priority would not receive payment for a long period. The court held that the question was one for the legislature and that the court could not exercise a judicial function with respect to it. In the opinion it was said:

> "It is argued on behalf of defendant that the Bank Guarantee Law contemplates unity of treatment of depositors, that the fund is hopelessly insolvent and that some method of equitable distribution of the fund should be devised and carried out. This is a legislative problem rather than a judicial one.
>
> "The bank depositors' guarantee fund is insolvent in the sense that certificates thereon have been issued to depositors of failed banks greatly in excess of the fund now on hand to pay them, but this is a situation made possible by the Bank Guarantee Law—although that situation, perhaps, was not anticipated when the law was enacted. Even if this court should ignore the statute above quoted, a thing it would not be justified in doing, and attempt to disburse the bank depositors' guarantee fund among all holders of certificates thereon, we could not do it without ordering a termination of the operation of the Bank Guarantee Law—an order we would have no authority to make."

If the Guarantee Fund Law had not fixed the exact amount of the special assessment but had left that to the discretion of the Department of Trade and Commerce and the Department of Trade and Commerce were about to levy an assessment greatly in excess of the assessments that had been levied in the past, then there might be

something to the argument of the plaintiff bank with reference to changed conditions. But the maximum amount of the assessment is set out in the statute and the plaintiff bank when it decided in 1911 to come under this law knew exactly how much it might be required to pay. When the law was before the United States Supreme Court that court knew the maximum liability that the law placed on banks. There has been a change in conditions since 1909, but that change consisted of the legislature in 1923 reducing the maximum assessment from 1 per cent to one-half of 1 per cent.

This court has held the enactment of the law was a proper exercise of the police power. Under the operation of the law vested contract rights have been acquired by depositors. The legislature of Nebraska has seen fit to modify the law so that the banks will have to pay only the unpaid assessments now levied and a very small assessment for a limited term of years. At the expiration of that time the whole law becomes inoperative.

But action by the legislature is the *only way*, if any, their vested contract rights can be affected. Once vested as they are, they cannot be divested by judicial decree.

PROPOSITION OF LAW NUMBER THREE

The right of stockholders to receive dividends is inferior to the right of depositors with matured claims for deposits to have the banks pay the assessments provided by the law and upon the strength of which their deposits were made.

Sinking Fund cases, 99 U. S. 700.

Mobile R. Co. v. Tennessee, 153 U. S. 486, 14 Sup. Ct. 968, 38 L. Ed. 793.

Lexington Life Ins. Co. v. Page, 17 B. Mon. (Ky.) 412, 66 Am. Dec. 165.

Appellants urge that the rights of the stockholders in state banks in Nebraska to receive a fully compensatory return on their investment, after charging off all losses, is of prime and controlling importance. These rights, however, have always been held subject and inferior to the rights of other parties having contract rights against the corporation.

The Guarantee Fund Law places the rights of the depositors above even those of general creditors. Sec. 8033, C. S. Neb., 1922, provides:

> *Priority of Claims.* The claims of depositors, for deposits (not otherwise secured), and claims of holders of exchange, shall have priority over all other claims, except federal, state, county and municipal taxes, and subject to such taxes, shall at the time of the closing of a bank be a first lien on all the assets of the banking corporation from which they are due and thus under receivership, including the liability of stockholders, * * * * .

And Sec. 7, Art. XII, Constitution of Nebraska, provides:

> Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors over and above the amount of stock by him held to an amount equal to his respective stock or shares so held, for all its liabilities accruing while he remains such stockholder, and all banking corporations shall publish quarterly statements under oath of their assets and liabilities.

These provisions were in force when the stockholders went into the banking business in the state bank system. They were chargeable with knowledge of these provisions for the protection of depositors. The proposition of law we have just stated is for these reasons doubly applicable to the relative rights of depositors and stockholders in this case.

The Sinking Fund cases, 99 U. S. 700, is conclusive on the issue we have stated. In that case it was said:

> If a state under its reserved power of charter amendment were to provide that no dividends should be paid to stockholders from current earnings if some reasonable amount had been set apart to meet maturing obligations, we think it would not be seriously contended that such legislation was [illegible] either because it impaired the obligation of the charter contract or deprived the corporation of its property without due process of law. Take the case of an insurance company dividing its unearned premiums among its stockholders without saving by anything to meet losses, would any one doubt the power of the state under its reserved right of amendment to prohibit such dividends until a suitable fund had been established to meet losses from outstanding risks? Clearly not, we think, and for the obvious reason that while stockholders are entitled to receive all dividends that may legitimately be declared out of the current net income, their claims on the property of the corporation are always subordinate to those of creditors. The property of a corporation constitutes the fund from which its debts are to be paid, and if the officers improperly attempt to divert this fund from its legitimate uses, justice requires that they should in some way be restrained. A court of equity would do this if called upon in an appropriate manner; and it needs no argument to show that a legis-

lative regulation which restricts one to use of the corporation than a court would compel it to do without legislation is not unreasonable.

Under these circumstances, the stockholders of to-day have no property right to dividends which shall absorb all the net earnings after paying debts already due. The current earnings belong to the corporation and the stockholders, as such, have no right to them as against the just demands of creditors.

In *Lexington Life Ins. Co. v. Page*, 17 B. Mon. (Ky.) 412, discussing this principle, the court said:

> The board of directors in making the dividends in question considered as profits the premiums on unexpired risks and unless this was proper the dividends which were made were not authorized by the charter, inasmuch as independent of these premiums the assets of the corporation over and above its liabilities were insufficient for their payment. We think it is very evident that these premiums could not be properly regarded as profits. Only so much thereof as might remain after paying the amount of such losses as should occur would in reality constitute the actual profits on the insurances upon which they had been paid.

The right to dividends, essential as it is to the operation of business, cannot be used as an excuse for refusal to fulfill obligations imposed upon the banks both by the law under which they operated and by their own voluntary acceptance and promises. If an annual net earning of 7.12% on capital and of 5.26% annually on capital and surplus after charging off current and deflation losses could possibly be said to amount to confiscation, we still submit the contract rights of these depositors with matured claims would take precedence over the right of stockholders to dividends.

PROPOSITION OF LAW NUMBER FOUR

Change of conditions, even if material, as to the future operation of the law, will not affect the validity of the law as to rights acquired thereunder, while the law was admittedly valid and operative and the banks were receiving benefits from it.

After the adjudication by this court in the case of *Shallenberger v. First State Bank of Holstein, supra*, that an assessment of one per cent was reasonable, the banks did not and do not claim that the assessment was unreasonable or excessive prior to 1928.

Assume for the purpose of argument only, that the future operation of the Guarantee Fund Law would result in the imposition of an unreasonable burden upon the banks. Certainly the court cannot relieve the banks from their obligations arising during the period when the regulation was admittedly reasonable.

As we have said earlier in this brief, the legislature may perhaps, in a proper case and in the further exercise of the police power, affect the rights of depositors. But beyond question, the court cannot do so. These depositors have *vested contract rights* as this court said in *Lankford v. Platte Iron Works*, 235 U. S. 461.

If the continued operation of the law were to be held by this court to have no rational relationship to the public safety and public good, the court would be compelled to do so in the face of all precedent and all judicial interpretation of the Guarantee Fund Laws. But even if the court were to do this, it could not relieve the banks from the obligations incurred while the regulation was admittedly a proper and reasonable one.

If 1 per cent and later ½ of 1 per cent on the average daily deposits was not confiscatory prior to 1929, it is not confiscatory or prohibitive at the present time. The strongest basis of estoppel in this case is the positive representations of the banks, not that they would pay all

losses which might occur in the state banking system, *but that they would pay the amount which could be assessed against them, namely $6 on every $1,000 deposited.* They frankly stated in their advertisements that this assessment would not affect the solvency of any bank and that "*no bank ever failed because of the insignificant assessments of ⅛ of 1 per cent.*"

That fact is as true as it ever was and if we can believe the bankers themselves, it is beyond controversy. The assessment of ⅛ of 1 per cent is not, never has been, and never will be confiscatory or unreasonable. This court has passed upon that question and the evidence in this case establishes it beyond question. It is not open for discussion here.

This brings us again to the case of *First State Bank of Claremont v. Smith* (S. D.), 207 N. W. 467. Apparently the attorneys for the banks do not understand the import of this case, since they have selected one isolated sentence from the opinion which is not essential to the decision in the case and have ignored the real basis of the court's decision. And their statement that the South Dakota court has flown "right in the face of the decisions of the Supreme Court of the United States and of the Supreme Court of the state of Nebraska" conclusively shows their misapprehension of the import of the decision. There is no conflict whatever between the decision in that case and the holdings of this court. In the following paragraph is stated the real basis of the decision of the South Dakota court:

> "While counsel for plaintiff do not expressly admit that the law was constitutional at its inception, they have not devoted much time in argument on that

point. They contend that, even though it may have been constitutional when enacted, changed conditions now render the act violative of the constitution. *They reason from railroad rate cases which have at one time been held constitutional because the rates fixed by statute are reasonable and not confiscatory, and later under changed conditions such rates became unconstitutional. But there does not appear to be any analogy between those cases and this. It is well known that in trade and commerce prices are subject to fluctuation, and what is a reasonable charge for a service today may not be tomorrow, because not in just proportion to other prices and charges.* In this case the objection is not to the amount of the charge, but to the purpose for which it is made. Changed conditions have not changed the purpose. *If the purpose of the law was legitimate, and the act therefore constitutional at the time of its enactment, perforce it must remain so, although because of changed conditions its purpose is no longer useful or desirable. Its uselessness may be a cogent reason for its appeal by the lawmakers, but it can have no weight with the court, in construing it.* If the law was constitutional when enacted it now is, and all that portion of the complaint pertaining to changed conditions is immaterial in the inquiry now before us." (Italics ours.)

This court in the case *of Shellenberger* v. *First State Bank of Holstein*, *supra*, decided that the condition that the state banks be required to pay the special assessment of one per cent on their average daily deposits to the Guarantee Fund was reasonable and within the police power of the legislature. That proposition is concluded. The reduction from 1 per cent to ½ of 1 per cent was in favor of the banks.

And so the banks in this case are in exactly the same position the banks were in South Dakota, in that they

PROPOSITION OF LAW NUMBER FIVE

The course of the United States Supreme Court in the case of Shaffenberger v. First State Bank of Monte [illegible] U.S. [illegible] S. Ct. [illegible] L. ed. [illegible] is to the maintenance of this suit by the plaintiff [illegible] on its own behalf or on the behalf of other banks [illegible] a res adjudicata

"5. *They alleged that the total deposits in the state banks amounted to $76,644,015.00, and that the special assessment provided for would amount to the sum of $766,440.15 annually, and that the said special assessment was unreasonable and confiscatory.*

"6. They further alleged that all of the banks would be made 'to contribute out of their assets the sums of money to be assessed against them, *not for the payment of their own liabilities, but for the payment of liabilities of some other bank or banks.*'

"7. They further alleged that the effect of the law would be to extend the credit of some of the banks for the benefit of the weaker banks and that the public credit was being extended for private purposes."

It is fundamental that a judgment is conclusive on the parties thereto as to *all matters or claims which either party could make or might have made relative to the matter in controversy.* It is perhaps unnecessary to cite authorities on this point.

The demurrer to the petition admitted all facts well pleaded and so this court had before it the contention that the special annual assessment of $766,440.15 on banks having deposits of only $76,644,015.00 was confiscatory and unreasonable. This issue as well as every other issue presented by the pleadings was adjudicated against the banks by the sustaining of the demurrer and the dismissing of the case. The Abie bank was then in existence, and accepted the adjudicated act. The allegations and the proof offered by the banks in the instant case on this question of the reasonableness or oppressiveness of the special assessment are much weaker than those admitted by the demurrer in the Holstein case. In the instant case, with

deposits of over $252,000,000.00, the special assessment can be only ½ of 1 per cent or a little over $1,250,000 annually. The relative amount is just one-half.

In the Holstein case too, the banks pleaded that they would be forced to contribute out of their assets sums of money to be used in the payment of liabilities of other banks. That also was admitted by the demurrer and that issue adjudicated by the court. That objection was of just as much force and entitled to just as much consideration then, as it is now.

Likewise, the questions as to the authority of the state to regulate the banks as proposed, after a charter had been granted, the possible loss of the value of the bank buildings and fixtures by reason of their being adapted to no other purpose, and that the public credit was being extended for the benefit of private enterprise, were all presented and decided in that case. Only the legislature can alter the law fixed by that decision. All these matters are adjudicated and concluded under the existing law.

Appellants contend vigorously in their brief that this court did not have before it in the Holstein case in passing upon the validity of the Guarantee Fund Law, the question of the oppressiveness nor the confiscatory character of the assessments. They also contend that this court did not have before it in that case the contention that the assessments would be taken to pay depositors in other banks than the banks contributing such assessment.

These are exactly the issues which the court did have before it. The pleadings in that case amply presented these very propositions. The decision of this court in the

Holstein case decided all the legal questions presented in this case. All other matters are purely economic and are solely for the decision and action of the legislature. The wisdom of the legislation is not for the court. The Guarantee Fund Law is sound as a legal proposition and is not confiscatory. That has been decided. If it were an economic hardship or were unsound from a business standpoint, that is an entirely different matter and one with which the courts are not concerned.

The phrase "insignificant taking" as used in Noble State Bank case.

The appellants refer to this phrase from the opinion of Justice Holmes in the Noble State Bank case. In explaining the fallacy of the Oklahoma bank's argument in that case, that the property of the banks was being *taken* in violation of Art. 1, Sec. 10 and the 14th amendment to the Constitution of the United States, Justice Holmes said that even in those cases *where the police power was not involved* and private parties *were actually deprived of their property for public use, a comparatively insignificant taking was justified for a purpose which was primarily a private use, but which had some ulterior public advantage.*

As illustrating the meaning of this statement in his opinion Justice Holmes cited the cases of *Clark* v. *Nash*, 198 U. S. 361, *Strickley* v. *Highland Boy Gold Min. Co.*, 200 U. S. 527, and other cases of similar nature. Both of these cases referred to had to do with the constitutionality of statutes of the state of Utah authorizing private individuals to condemn right of way across other private land for the purpose of irrigation or mining. While the property of one person was *taken* for the immediate benefit of

another private person, still the court held that it was not in a position to say but that there was some ulterior public purpose, because of peculiar natural and economic facts and circumstances, such as would suffice to sustain the law. And the decision was that, although the property of the individual was taken under a statute having no relation to the police power, still there appeared to be a sufficient relation to the public good to justify a comparatively insignificant taking.

Justice Holmes then proceeded to the discussion of the police power of the state upon which the decision was based. The case of *Camfield* v. *U. S.*, 167 U. S. 518, was cited. This case had to do with police power and did not refer at all to the extent to which the value of private property might be affected in the exercise of that police power.

Apparently the extent to which the value of the property and property rights will be affected never has been and was not intended by the court to be a test as to the validity of a law passed in the exercise of the police power.

In the case of *Shallenberger* v. *First State Bank of Holstein*, following the Noble State Bank case, the court held that a special assessment of one per cent annually did not affect the validity of the Guarantee Fund Law; such assessment was double the one now contested.

If ever there was an occasion where the court was urged to invade the province of the legislature, it is in this Abie case. It is indeed not always an easy matter to mark the line where the police power of the state is limited by the

federal and state constitutions. As stated by Justice Holmes in the Noble State Bank case, judges should be slow to undertake to place their conception of the necessity or expediency of measures above the opinion of the law making body as to those questions. In the opinion he said

> "We have few scientifically certain criteria of legislation, and as it often is difficult to know the rule where what is called [illegible] is limited by the constitution of the United States judges should be slow to read into it [illegible] restrictions as against the lawmaking power."

Not only was this Holstein case determined on demurrer but every other Bank Guaranty Fund case that *Abie* examined has been determined on demurrer in favor of the law and some of them as in this case, after large liabilities had accrued. These cases form a consistent record, holding that the questions involved are all a matter of legislative wisdom and policy.

The depositors relied upon and acted under the Holstein decision. The banks featured it to obtain public and private deposits, some of which have resulted in claims against the Guaranty Fund. It does not seem conceivable that such claims, so arising, can now be cancelled by judicial decree.

PROPOSITION OF LAW NUMBER SIX

The plaintiff bank and those banks for which it purports to bring this action by voluntarily and without protest operating under and accepting the benefits and privileges of the bank depositors' guarantee law have waived their

right if any, and are estopped to bring this suit, and especially by their acts, representations and conduct during the last several years of inducing deposits on the strength of alleged guarantee fund protection, have said banks waived their right, and are now estopped to maintain this suit against depositors with matured claims against said fund

12 C. J. Sec. 190, 194, pages 169-71 (Constitutional Law)

10 R. C. L. Sec. 140, page 836 (Estoppel)

21 C. J. page 1216, Sec. 220 (Estoppel)

Winthrop v. Pelham, 230 Fed. 702

Grand Rapids & Indiana Ry. Co. v. Osborn, 193 U. S. 17, 49 L. Ed. 598, 604

Daniels v. Tearney, 102 U. S. 415, 26 L. ed. 187, 189

Mellen Lumber Co. v. Industrial Commission of Wis., 154 Wis. 114, L. R. A. 1916 A. pages 374, 377

American Life Ins. Co. v. Palmer, 238 Mich. 580, 214 N. W. 208

Meyer v. City of Utica, 117 Neb. 511, 221 N. W. 438.

Booth Fisheries Co. v. Industrial Commission, 271 U. S. 208, 46 S. Ct. 491.

In re Tarnowski, 191 Wis. 279, 210 N. W. 836

People v. Fidelity & Casualty Co., 222 Mich. 296, 192 N. W. 658.

First State Bank of Claremont v. Smith, 49 S. D. 518, 207 N. W. 467.

Parties will not be allowed to operate under a law as long as they deem it to be advantageous and then as

against persons with whom they have dealt, claim the same law to be invalid when it appears to them that they may be able to escape liabilities incurred while operating under it. This matter of estoppel and waiver applies with equal force to constitutional questions. The courts are unanimous on the subject. We shall cite the authorities without further discussion.

Booth Fisheries Co. v. Industrial Commission, 268 U. S. 675, 69 L. Ed. 908, in an opinion by Chief Justice Taft:

> "More than this, the employer in this case having elected to accept the provisions of the law, and such benefits and immunities as it gives, *may not escape its burdens by asserting that it is unconstitutional. The election is a waiver and estops such complaint.*"

In the case of *People v. Fidelity & Casualty Co.*, 222 Mich. 296, 192 N. W. 658, the validity of a law was involved which required persons who desired to engage in the business of selling foreign steamship tickets to obtain a certificate of authority from the commissioner of banking of the state and to file a bond. One Weinberger tendered the bond of the defendant insurance company and received the certificate. Ostapow paid Weinberger for two tickets. The money was misappropriated. Suit was brought on the bond and the insurance company answered by attacking the constitutionality of the act providing for the giving of the bond. In its opinion, the court said:

> "Defendant cannot under the facts of the case question the constitutionality of the act. Both it and its principal, Weinberger, have had the benefits of it, and under such circumstances cannot question its validity. Defendant has had its premiums for executing the bond and Weinberger, until he absconded, all

the benefits the act conferred; by the favorable action on his application to the commissioner of banking he obtained a certificate from that officer representing the state authorizing him to engage in the business of selling steamship and railroad tickets for transportation to or from foreign countries. *The fact this particular customer did not deal with him with knowledge of the statute is unimportant. Under the law the certificate was displayed in his place of business; it was in effect a certificate of moral character and financial stability. Neither he nor his surety can now claim the act is unconstitutional.*" (Italics ours.)

In the case of *Grand Rapids & Indiana Railway Co.* v. *Osborn*, 193 U. S. 17, 49 L. Ed. 598, 604, the court said:

"It results from the foregoing that Sims—the purchaser of the railroad property in question at the sale under foreclosure—and his associates could not demand to be incorporated under the statutes of Michigan as a matter of contract right. Possessing no such contract right, they or their privies cannot now be heard to assail the constitutionality of the conditions which were agreed to be performed when the grant by the state was made of the privilege to operate as a corporation the property in question. Having voluntarily accepted the privileges and benefits of the incorporation law of Michigan the company was bound by the provisions of existing laws regulating rates of fares upon railroads, and it is estopped from repudiating the burden attached by the statute to the privilege of becoming an incorporated body."

In *Winthrop* v. *Fellows*, 230 Fed. 702, an attack was made upon a two-cent passenger fare rate statute. The court said (p. 704):

"It follows that the railroad company, its stockholders, as such, and all claiming under it by right of representation, are effectually estopped to question

the validity of the statute here under consideration. Having sought and accepted the rights and privileges thereby granted and conferred, they must perform the duties and obligations therein imposed. *Grand Rapids & Indiana Ry. Co. v. Osborn*, 193, U. S. 17, 24 Sup. Ct. 310, 48 L. Ed. 598; *Commissioner of Railroads v. G. R. & I. Ry. Co.*, 130 Mich. 248, 89 N. W. 967; *Interstate Ry. Co. v. Massachusetts*, 207 U. S. 79, 28 Sup. Ct. 26, 52 L. Ed. 111, 12 Ann. Cas. 555. The last word upon this subject is found in the decision of the supreme court in the very recent rate case of *Northern Pacific R. R. Co. v. North Dakota*, 236 U. S. 585, 35 Sup. Ct. 429, 59, L. Ed. 735."

In *Daniels v. Tearney*, 102 U. S. 415, 26 L. Ed. 187, 189, the question involved was the effect of receiving the benefits of an invalid bond given under an unconstitutional statute. The court said:

"It is well settled as a general proposition, subject to certain exceptions not necessary to be here noted, that where a party has availed himself for his benefit of an unconstitutional law, he cannot in a subsequent litigation with others not in that position, aver its unconstitutionality as a defense, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit. In such cases the principal of estoppel applies with full force and conclusive effect. *Ferguson v. Landram*, 5 Bush 230; see *Same v. Same*, 1 Bush 548; *Vanhook v. Whitlock*, 26 Wend. 43; *Lee v. Tillotson*, 24 Wend. 337; *People v. Murray*, 5 Hill 468; *Burlington v. Gilbert*, 31 Iowa 356; *R. R. Co. v. Stewart*, 39 Iowa 267."

In *Mellen Lumber Company v. Industrial Commission of Wisconsin*, 154 Wis. 114, 142 N. W. 187, 1916 L. R. A. 374, 377, an employer questioned the constitutionality of the Workman's Compensation Act. The court said:

"The argument that the provision under discussion is violative of the 'due process of law' clause of the

Federal Constitution, cannot prevail. It was optional with the appellant to come in under the compensation act or stay out. It accepted the provisions of the act as they were, the burdens as well as the benefits, and so long as it remains under the law it must take the statute as it finds it. *Daniels* v. *Tearney*, 102 U. S. 415, and cases cited page 421, 26 L. ed. 187, 189; *Grand Rapids & I. R. Co.* v. *Osborn*, 193, U. S. 17, 29, 48 L. ed. 598, 604, 24 Sup. Ct. Rep. 310."

Exactly the same issue of estoppel was involved as in the case at bar in the case of *First State Bank of Claremont* v *Smith*, 49 S. D. 518, 207 N. W. 467:

> "*State Banks, who for ten years have operated under the benefits of depositors' Guarantee Law, giving them the right to hold public money and deposit without additional security, and other benefits, held not in a position to now claim that they have not consented thereto.*
>
> "So far as the banking corporations are concerned the assessment sought to be prohibited is not a tax or involuntary taking of their property, but a part of the consideration exacted by the state for the corporate franchise. So, also, is the law a part of the privileges and conditions under which the unincorporated banks were organized and have been doing business. *Such banks for ten years, accepted the benefits of the depositors' guarantee fund, which gave to them the right to hold, on deposit, public moneys without additional bond or security, to enjoy the confidence of the public by reason of the existence of such guarantee fund, and all other benefits, real or supposed, emanating therefrom, and they are not now in a position to claim they have not consented thereto.*" (Italics ours.)

Typical representations made by the Banks

At the time of commencing this brief we have assembled some of the most typical representations made by the banks in regard to the benefits they were receiving from the operation of the law and their ongoing pledges to bond and pay their obligations to depositors in failed banks.

The banks now attempt to minimize their advocating of the law and the benefits they were obtaining from it during the period prior to this suit. During those years when they were using the law as a most effective weapon and were bending every effort to increase the deposits in the state bank system these banks spoke openly and often boastingly of what the law had done for them.

Their own words uttered when flushed with their success made possible by the guarantee fund law and in an attempt to further advance their interests are perhaps entitled to greater weight than the view expressed in their brief. At that time they advertised with appropriate and appealing illustrations.

The twenty-six full advertisements are reproduced in printed Record, but without page numbering, and inserted between pages 238 and 239.

In Exhibit 21 of Exhibit 13, Record, page 238, insert, full page advertisement of the banks in OMAHA BEE:

> "It took 14 years, without the guarantee law to climb from $10,000,000 to $71,000,000. Under the law, *only nine years were needed to climb from* $72,000,000 to $270,000,000."

In Exhibit 22 of Exhibit 13, Record, page 248, insert full page advertisement in Omaha Bee

In Exhibit 28 of Exhibit 13, Original Record, volume II, page 267, a questionnaire given large circulation by the banks and referred to in this brief, they said:

"QUESTION What would have been the effect on the state if there had been no guarantee of deposits law?

ANSWER *The effect would have been similar to that existing in one or two neighboring states, that cannot with propriety be mentioned, whose financial system is now in a state of chaos as a result of the lack of confidence due wholly to the fact that there is no bonded backing their financial institutions.*

"QUESTION Does the law in Nebraska recognize state banks as depositories for public funds?

ANSWER *It does. Every state bank may be used as a depository for public funds for unlimited amounts without bonds of any kind.*"

In another pamphlet, "The Bank Guarantee Law Challenged and a Red Hot Answer by a Nebraska Banker" (Exh. 30 of Exh. 13, p. 268, Orig. Rec.), circulated by them, they said:

"In Nebraska, instead of there being applications for state banks to nationalize, there have been scores of applications from national banks to take out state charters during the last two years and so far as we have any record, there has been only one application for a national charter made since the deflation period

began and we have every reason to believe that other reasons than the guarantee law caused the change."

In Exhibit 16 of Exhibit 13, Record, page 238, insert, a full page OMAHA BEE advertisement had a picture of a money pouch with $288,000,000 thereon, and underneath:

"95,000 Years of Labor

"Small wonder that in the fifteen years the guarantee law has been in operation among the state banks in Nebraska the deposits in these banks have grown from a little more than $70,000,000 to nearly $288,000,000.

"*It is a splendid thing to live in Nebraska and to know that the money placed in the state banks in this state is safe.* As a Nebraskan, it is a splendid thing to know that this is A STORY NO OTHER STATE CAN TELL."

From Exhibit 7 of Exhibit 13, Record, page 238, insert, a full-page OMAHA BEE advertisement, in quote:

"A Message of Strength

"The bankers in Nebraska's state banking system send a message of strength to the people of the nation. Fifteen years ago the state banks of Nebraska associated together under the law for the purpose of making certain that ~~~. this state depositors should no longer be dependent upon the turn of the business cycle, nor upon the skill or lack of skill of the individual banker for the safety of his capital or of his savings, entrusted to their care."

In Exhibit 6 of Exhibit 13, Record, page 238, insert, another OMAHA BEE advertisement, appropriately illustrated, appears:

"No Mattress Banks in Nebraska

"In Nebraska there is no longer any need to keep the money in the mattress, in an old woolen sock or

hidden away in a tin can. The state banks in Nebraska are associated together under the law for the mutual protection of their deposits. There have been bank failures in Nebraska. *But there has been a lower proportion of failures in Nebraska than in most states.*"

In Exhibit 4 of Exhibit 13, Record, page 238, insert, an OMAHA BEE advertisement, is a conversation between travellers, and illustrated, from which we quote:

"Third Traveler—'But that is not the whole story. Nebraska's financial institutions are on a solid foundation. *Bank failures have been fewer here*, and under the state law the deposits in state banks are protected'."

Did the state banks benefit to the extent of over $100,000,000 of deposits because of the guarantee fund law? Did the whole state bank system benefit by the stability created by that law? Were many of the state banks saved from ruin and all strengthened by the operation of the law? Was it of any benefit to the state banks to carry millions of deposits of public funds without bonds?

Certainly the statements of the banks at that time are worthy of belief. They said they were the facts. Most certainly they were. And they stated then one further fact which time alone will determine to be true or false. They stated repeatedly, directly and by subtle implication, designed most surely to inspire the confidence of the depositor whose deposit they sought to secure, *that they would keep faith with the depositor and would make payment to the depositor as they had represented and promised they would.*

The banks are estopped by their representations of fact and by their representations and promises that they would pay depositors in state banks.

The banks now say in their brief they are not estopped because they were not aware of all the facts regarding the condition of the guarantee fund. They were in a better position to know the facts than anyone else. In their advertisements and representations to the public they claimed to know what the facts were. Through newspapers and pamphlets, they spoke positively of the facts as being within their knowledge, proclaimed that a committee of "skilled bankers" from their own ranks and nominated by them was administering the guarantee fund law, *and again and again pledged themselves to meet and pay their obligations to the depositors in failed banks.*

Here let us use their own words again, spoken at a time when worthy of the greatest credibility, spoken at a time when thousands of the present claimant depositors had not yet entrusted their savings to the member state banks. Their representations were not as to how much the guarantee fund owed or what its assets were, but as to the intention, purpose and pledge of the state banks to meet the obligations which the operation of the law placed upon them, and assurance to the depositors that they would be able to meet these obligations and that they would do so. Without comment we quote further their statements at that time in various OMAHA BEE advertisements, all aptly illustrated and some of them reproduced in miniature in this brief.

From Exhibit 3 of Exhibit 13 of insert, at Record, page 238:

"In the Hands of Skilled Bankers

"Skilled bankers administer the Nebraska law that protects the deposits in Nebraska state banks. The guarantee fund commission is the official body, and

under the law membership on this commission is limited to state bankers."

From Exhibit 5 of Exhibit 13, page 238, insert:

"Further experience and further operation of the Nebraska banking laws are moving in the direction of cutting individual failures to a minimum by bringing to the state banking system the counsel and experience of the state's best bankers."

From Exhibit 6 of Exhibit 13, inserts at Record, page 238:

"The deposits of the big business house, the money that is being laid away for the purchase of a home and the dimes and pennies that are deposited in the baby's savings account *are all safe in the state banks of Nebraska because deposits are protected.*" (Rec., p. 244.)

From Exhibit 8 of Exhibit 13, inserts at Record, page 238:

"Do You Believe in Insurance?

"The purpose of this chapter in the story that only Nebraska can tell is not to discuss this point, however; *it is to call attention to the fact that the system that has made this possible is like a giant insurance company.*

"The combined deposits in the banks of the banking system in Nebraska is $286,000,000, the funds of more than 500,000 depositors. The men and women who are these depositors and whose money is in these banks *know that it is safe because under the workings of the giant insurance plan, these deposits are protected.*

"This insurance plan not only protects the deposits in the bank, it protects the sleep of 500,000 depositors

and their peace of mind. It protects the business that is dependent upon these deposits. It protects the farmer whose funds on deposit are to be used for the clearing of the mortgage or the stocking of the feed lot. It protects the worker whose funds in the bank are being saved against the day when he and his wife and little one can move into the new house on the hillside."

From Exhibit 9 of Exhibit 13, insert at Record, page 238:

"Your deposits in this bank are protected under a plan whereby the state banks as a whole are associated under the law and through a system of assessments and central control, your deposits are safe. *If a bank fails for any reason we jointly pay the loss.*" (Rec., p. 247.)

From Exhibit 23 of Exhibit 13, insert at Record, page 238:

"The state bankers in Nebraska realized that the law placed an obligation upon them and that when the word went out that state bankers in Nebraska were associated under the law to protect depositors there was but one thing to do—protect them. They have protected them. The weathering of the financial stress of deflation has brought a new fame to the state bankers in Nebraska. *Sound banking, loyalty in meeting obligations and the courage to make the guarantee law mean what it says, has come to be known as the Nebraska Idea.*"

From Exhibit 25 of Exhibit 13, insert at Record, page 238:

"Building Business on a Certainty

"When the balance in the bank is always assuredly a balance, and not in danger of being wiped out

through bank failure, business can build on a certainty. *This is the guarantee that the state banks in Nebraska furnish to business.*

"Under the bank guarantee law the state banks of Nebraska absorb the losses of individual banks that go under, thus furnishing to business the certainty that their bank balances will always be balances, so long as the business is sound and balances are maintained. If there is any wavering, any loss of balances, it will be the individual business that wavers, it will be the individual business that loses its funds, it will not be the state banking system."

And to show who were making these promises and representations they published a final page article of THE OMAHA BEE series to which the names of 336 banks were attached in which they said (Exh. 27 of Exh. 13, insert at Record, p. 238):

"*The men who told the story that no other state can tell are the men who control and operate the state banks in Nebraska.* A group of these Nebraska state bankers felt that this story should be told to the people of the state and to the people of other states. They felt that such a record should be known to all, that there might come to Nebraska the benefits to which a strong financial foundation rightfully entitled her. *They raised the funds, they laid out the plans and directed the writing of the chapters in this Nebraska story that has gripped the attention of the nation.*"

Then followed other articles, pamphlets and propaganda, published and broadcast by banks to further enlighten the prospective and existing depositor, to disparage the national banks and to render assurance of the ability and

intention of the state banks to keep their promises to depositors:

In Exhibit 29 of Exhibit 13, page 267, volume II, Original Record, one of the pamphlets of the banks:

> "QUESTION. Is it a fact then, that when a depositor places his money in a state bank, that all of the state banks in Nebraska guarantee its return to him regardless of what may happen?
>
> "ANSWER. *In effect that is exactly the situation.*"
>
> "QUESTION: Does the guarantee fund protect the depositors against loss in national banks?
>
> "ANSWER: It does not. The state does not have control over national banks. The law only applies to state banks and deposits only are insured against loss in state banks."
>
> "QUESTION: Are the national bank depositors protected by a national bank guarantee law?
>
> "ANSWER: They are not so protected. There is no such thing as a national guarantee law affecting national banks."

From a FREMONT EVENING TRIBUNE advertisement (Rec., p. 340):

> "If you put your money in our savings department you will not only receive compound interest but also have absolute insurance. One thousand state banks are assessed by law for the purpose of protecting your deposits. *You cannot lose a dollar in this bank by fire, flood, theft or failure.*"

From Exhibit 30 of Exhibit 13, page 268, volume II, original record, The Red Hot Answer by a Nebraska Banker pamphlet, circulated by the banks:

> "The state banks of Nebraska are bound together unto a mutual insurance company carrying their own risks and paying their own losses."

These advertisements of the banks took on various forms intended to affect most strongly the public mind with reference to the guarantee fund law. On July 6th, 1926, they published as a part of their propaganda a representative picture of the Supreme Court of the United States and under it in bold type (Exh. 5 of Exh. 13, insert at Rec., p. 238, an OMAHA BEE advertisement):

"The Opinion of the Highest Court"

Then followed an excerpt of the opinion of that court in the Holstein case:

"In sustaining the law the court said:

"'When the legislature (of Nebraska) declares in its banking laws that incorporation, inspection and cooperation for the protection of deposits are necessary safeguards, this court certainly cannot say that it is wrong. The power to compel beforehand, cooperation and thus, it is believed, to make a failure unlikely and a general panic almost impossible, must be recognized if government is to do its proper work.

"'In our opinion the statute before us is well within the state's constitutional power.'—United States Supreme Court."

And on September 12th, 1926, they published a cut of the imposing capitol building of Nebraska. And under this picture, representing the ultimate in stability, strength and progress, they said (Exh. 24 of Exh. 13, insert at Rec., p. 238, a full-page OMAHA BEE advertisement):

"Strong Banks Make Strong States"

"The state banks in Nebraska are strong banks. They have proven their strength by their conduct during the deflation period. In Nebraska the strength of the state banks does not depend upon the strength of any individual bank. They are associated to-

> gether under the bank guarantee law. The strength of the individual banks therefore is the strength of all the banks."

We must admit that the banks in this form of advertising displayed a most thorough understanding of the psychology of the great mass of depositors. Nothing could better tend to engender a feeling of security in the public mind than the use of the likeness of Nebraska's capitol. Nothing could better lull to rest any incipient fears arising in the public mind, than the assurance that the supreme court had sanctioned the law and held it constitutional.

In order to impress indelibly upon the mind of the depositor their sincerity and steadfastness of purpose in promising to perform their obligation to the depositors, they printed on August 26, 1926, in the Sunday OMAHA BEE, a large portrait of Abraham Lincoln and compared their adherence and promise to perform their duty under the Guarantee Fund Law to the loyalty and steadfastness of Lincoln. Here, most certainly, was an appeal which the average depositor with his small earnings and small savings could not withstand. Here is what they said in bold letters under the picture of Abraham Lincoln (Exhibit 20 of Exh. 13, insert at Rec., p. 238, a full-page OMAHA BEE advertisement):

> **"Giving Up Profits to Support a Principle"**
>
> "One of the leading state bankers had declared that it was a picture of Abraham Lincoln in his office that gave him the courage to stick it out.
>
> "'Lincoln had a dozen opportunities to quit,' he said, 'but because he stuck to it, America is today the greatest nation in the world.' Because the state bankers in Nebraska stuck to it, this state is today

> famous among the great sisterhood of states as the only state in which not a dollar of deposits has been lost through the failure of state banks."

A more potent means of inculcating confidence would be difficult to imagine. To the average depositor no name would be so impressive in imparting a feeling of security. It must be admitted the banks were quite astute observers of human nature.

Their representations went further than as to the condition of the Guarantee Fund Law or the facts involved in its operation. They amounted to a positive statement that the banks would make good their promises. In Exhibit 13 of Exhibit 13, insert at Rec., p. 238 (an OMAHA BEE advertisement), they ostensibly put their words upon the lips of a mother and father who were discussing the probable safety of their savings. Under a caption,

"Where Have We Got Our Money, John?"

they publish this mythical conversation, conceived in their own minds and intended ingeniously to inspire confidence in the minds of depositors.

> "Mother—'I notice in the paper John that some banks down south have failed. Think of all the money those people down there will lose. I'm just wondering where we've got our money.'
>
> Father—'It's all right, Mary, the money is in the state bank in town. I tell you that guarantee law in Nebraska is a mighty fine thing. We can go on about our affairs and know that even if our bank goes under we will get our money because the other state banks will make it good'."

> "When the news was printed recently of the failure of a group of banks in two southern states it is probable there were conversations similar to that reproduced here all over Nebraska."

Is it any wonder the state banks thrived under the operation of the Guarantee Fund law, utilized and exploited as it was? Is it strange that, as they say,

> "It took 14 years without the guarantee law to climb from $10,000,000 to $71,000,000. Under the law, only 9 years were needed to climb from $72,000,000 to $270,000,000."

All that the state of Nebraska and the depositors are asking in this case is that the banks fulfil their parts of the undertaking as they promised and as the depositors relied upon.

The few banks now prosecuting this suit claim that the banks cannot afford to pay the assessments and that its collection would mean a wrecking of the state banking system. The facts established by the evidence absolutely fail to show any semblance of foundation for such contention. Here again the representations made by the banks to the depositors are very material. Here was their position before they started this suit in January, 1928 (Exh. P, p. 474, vol. III, Orig. Rec.):

> "This limit, in the case of the bank guarantee fund, which fund is used for the purpose of paying depositors in failed banks, is fixed at 6/10 of 1 per cent. Therefore for each thousand dollars of deposits that a bank has, it must pay annually a tax of not to exceed $6.00 for the support of the guarantee fund. *You can readily see that such an assessment, can be paid by any bank that is solvent. In other words, a bank that fails, fails not because it had to pay $6.00*

a thousand into the guarantee fund but for other and vital reasons. No bank fails as a result of the losses sustained in other banks.

"If a bank loans $1,000 to a customer at 8 per cent interest it would collect $80.00 interest in the course of a year. In comparison, with this income of $80.00 we have the same $1,000 taxed by the state the sum of $6.00, which must go into the guarantee fund. Therefore, the bank's earning of $80.00 has been reduced to $74.00 as a result of the tax, which must be paid into the state guarantee fund.

"*This gives a very vivid comparison of just what it means to the bank to pay the highest tax that can be possibly levied against it under the present law.* It is a comparison that ought to convince you, and every other stockholder, that your property cannot be confiscated, and going banks cannot be hurt materially through the payment of this tax. *In fact, the banks can pay this tax as easily as you can pay your school tax.*"

We have perhaps quoted enough. Every possible element of estoppel exists, representations of alleged facts as such, representations of their intention to perform and an absolute promise to do so, representations as to their ability and intentions to pay. And now they ask the aid of the court to relieve them from the consequences but with no offer to do equity, no offer to make whole these depositors whom they attempt to divest of their right to recover their deposits.

PROPOSITION OF LAW NUMBER SEVEN

The depositors' guarantee fund was not enacted primarily for the welfare of the banks but specifically for the protection of depositors in state banks.

Sec. 7983, C. S. Neb. 1922, Sec. 1, ch. 10, Laws 1909.

Sec. 8024, C. S. Neb. 1922, Sec. 44, ch. 10, Laws 1909.

Citizens State Bank of Stratton v. *Strayer*, 114 Neb. 567.

Shallenberger v. *First State Bank of Holstein*, 31 S. Ct. Rep. 189, 55 U. S. (L. ed.) 117, 219, U. S. 114.

First National Bank v. *Hirning*, 204 N. W. (S. D.) 901.

Farmers State Bank v. *Smith*, 209 N. W. (S. D.) 358.

The courts have said:

"The paramount purpose of Bank Deposit Guarantee Law is to secure depositors and guarantee prompt payment; * * * * It must be liberally construed to accomplish its paramount purpose."

Chapman, Commission v. *Guarantee State Bank*, 267 S. W. Rep. (Tex.) 690.

Farmers State Bank of Mineola v. *Mincher*, 267 S. W. Rep. (Tex.) 996.

"It is a fund created by statute, derived from assessments of the banks operating under the law, to insure the depositors of such banks against loss."

First National Bank v. *Hirning*, 204 N. W. (S. D.) 901.

Farmers State Bank v. *Smith*, 209 N. W. (S. D.) 358.

Section 1 of the Nebraska act of 1909 made this fundamental declaration:

"Sec. 1. (Banking a quasi-public business.) The business of banking * * * * is hereby declared

to be quasi-public business and subject to regulation and control of the state."

And Section 44 of the act provided:

"Sec. 44. (Guarantee Fund Assessment.) For the purpose of providing a guarantee fund for the protection of depositors in banks, every corporation engaged in the business of banking under the laws of this state, shall be subject to assessment, be levied, kept, collected and applied as hereinafter provided."

The primary purpose of this act is the general protection of the public and the depositors' guarantee fund is "for the protection of depositors in banks". Benefit to the banks is not the principal objective, though such benefits have followed. This theory of the law has been directly affirmed by this court, in the Holstein case. The Nebraska Supreme Court in *Citizens State Bank of Stratton v. Strayer*, 114 Neb. 567, passing on a regulatory provision of the banking act, stated that "the banking business carried on pursuant to a state charter, is quasi-public, and for the protection of the public and its interests, and is subject to reasonable regulations by the state."

The issues have been somewhat simplified by the apparent position of the banks that they do not challenge any part of the act except the section applicable to special assessments and that as to such section they challenge it as having *become* confiscatory and as being of no future *benefit to the banks.* The act having been passed for the "protection of the depositors" manifestly its effective benefits could only be available to or be invoked by such depositors as might be depositors in failed banks. Depositors in going banks have no necessity to avail themselves of its provisions. Hence the section might properly have

read "*for the protection of depositors in failed banks*". The obligation of the going banks is thus to pay assessments to indemnify and protect depositors in failed banks. So generally and specifically the inquiry in this case has to do directly with the equities and legal rights as between the going banks and the depositors of private and public funds in failed banks.

Whether the assessments levied on the banks are sufficient to pay the depositors in full is not of large concern to the banks. Any payment to the depositors is a benefit regardless of its amount or when paid. The banks are not required by law to pay assessments sufficient to reimburse depositors in full; all the banks have to do is to pay the assessments provided by law even if not enough to pay the depositors.

In *Farmers State Bank* v. *Smith*, 209 N. W. (S. D.) 358, the plaintiff sought to restrain the collection of a guarantee fund assessment claiming the right to set off an amount equal to the assessment upon indebtedness due it. The court in denying the plaintiff's prayer, discussed the Depositors' Guarantee Fund Law as an insurance scheme and the status of depositors holding claims against it and said:

> "Treating the depositors' guarantee fund law as an insurance scheme, the assessments are not insurance premiums due from the insured, *but in the present state of the fund are loss payments due from the insurer to the insured;* payment to the fund being a means of payment to insured depositors who are not appellant's debtors.
>
> "As soon as the assessment was made, it was the duty of appellant to place the money at the disposal of the guarantee fund commission to be distributed

according to law, *and from that time the money due upon assessment was impressed with a trust, and belonged to those designated by statute as entitled thereto.* The bank became the trustee of such money until delivered to, or placed at the disposal of, the commissions."

The Nebraska state banks repeatedly advertised and represented to the present claimant depositors that the banks constituted one giant insurance company in which the depositors' money was secured. The banks were the insurers, the depositors, the insured. In short they at that time, when seeking depositors, made a true representation. The primary and ultimate of the law was to protect the depositor—to give him insurance on his money. The banks profited incidentally as an incident to their business venture—in the same way an insurance company would from a law prescribing sound statutory insurance regulations.

A depositor needs the protection of this law for the first time when the bank fails. His protection is the primary and ultimate object of the law.

PROPOSITION OF LAW NUMBER EIGHT

Banking is a quasi-public business which the state in the exercise of its police power may take under its control to the extent of prohibiting the business of banking entirely except upon such conditions as it may prescribe.

Noble State Bank v. *Haskell*, 219 U. S. 104.

First State Bank of Claremont v. *Smith*, 49 S. D. 518, 207 N. W. 467.

Shallenberger v. *First State Bank of Holstein*, 219 U. S. 114.

We do not believe that this proposition is controvertible.

Justice Holmes, in *Noble State Bank* v. *Haskell*, 219 U. S. 104, said with reference to the Bank Guarantee Fund Law that as to banks the legislature "may go on from regulation to prohibition except upon such conditions as it may prescribe." This power of regulation of banks by the legislature has been repeatedly recognized by the courts. We will not encumber the record by further quotations from the cases.

When Nebraska adopted the Guarantee Fund Law in 1909 the act included a section prohibiting private banking.

The state banks then in existence had three courses open to them. *First:* they could nationalize and avoid the law. *Second:* they could comply with and operate under the Guarantee Fund Law. *Third:* they could go out of business along with the individual bankers who did not care to incorporate.

All state banks organizing since 1909 have of course done so with full knowledge of the conditions imposed by the act.

The limit to which the state may go in imposing obligations as a condition to engaging in the banking business in the state is clearly not important in this case. Under the facts it is clearly evident that it is not a question of any bank being compelled to go out of business by reason of the special assessments.

Here it is not a question of banks going out of business because of the special assessments. It is merely a ques-

tion of some of the banks desiring to make a greater profit than their present earnings which in some cases were characterized by the trial court as "extravagant". It is a question of all the banks of the state bank system desiring to make an average annual net income of more than 11.18 per cent on their combined capital and surplus before complying with the obligation imposed by the legislature of Nebraska as a condition to operating a state bank.

PROPOSITION OF LAW NUMBER NINE

The statutory assessments for the benefit of the guarantee fund are not an involuntary taking of the property of the banks but constitute a charge and contribution definite and certain and known in advance, the payment of which is a condition precedent for commencing and continuing to do business as a state bank and which at any time can be avoided by going out of the banking business; in order to engage in the banking business the banking corporation had to get a charter from the state and to get the charter and keep it the bank had to comply with the conditions made a part of the charter by the state for the safety and protection of the public, and to obtain the benefits and privileges the law gave.

Noble State Bank v. *Haskell*, 219 U. S. 104.

Shallenberger v. *First State Bank of Holstein* 219 U. S. 114.

Wirtz v. *Nestos*, 51 N. D. 603, 200 N. W. 524.

First State Bank of Claremont v. *Smith*, 49 S. D. 518, 207 N. W. 467.

Farmers State Bank v. *Smith*, 50 S. D. 250, 209 N. W. 358.

The legislature in enacting the Guarantee Fund Banking Act created certain privileges and certain obligations. It is quite impossible for a court to compare and to measure them and their relative value and burden. For instance, state banks were permitted to loan one customer up to 20 per cent of the capital of the bank as against one-half that percentage permitted to national banks. The act enabled state banks to accommodate borrowing customers with one-half the capital investment. By the act, state banks were absolved from giving depository bonds for public funds. State bank charters enabled the carrying of reserves at interest while national banks were required to carry reserves without interest in Federal Reserve Banks.

Unquestionably, the best considered opinion on Guarantee Fund law was delivered by Justice Holmes in the case of *Noble State Bank* v. *Haskell*, 219 U. S. 104. The rule above is there vigorously announced and it has not been questioned to this day except as the Nebraska banks are now trying to do so. Several parts of the opinion are relevant:

> "The power to compel, beforehand, co-operation, and thus, it is believed, to make a failure unlikely and a general panic almost impossible, must be recognized, if government is to do its proper work, unless we can say the means have no reasonable relation to the end."

The banks now contend that the end Justice Holmes anticipated the law would accomplish has not been realized. To anyone, however, who has observed the effects of the deflation period on the banks of other states throughout the agricultural middle west it is clearly evident that Justice Holmes was not badly mistaken in his predictions.

The banks' own statements and advertisements during that period and the evidence in this case show that the bank failures in Nebraska would have been many times more disastrous than they would have been if it had not been for the existence of the bank Guarantee Fund Law during the period of deflation. Of course there were failures. There were bound to be failures and always will be failures under the most favorable circumstances during such a period. But there was no panic and the state banks of Nebraska during that period received the benefits of the stability given to the banking system and the confidence of the public.

Of course no one can now tell how many banks would have failed or what the condition of the present banks would be now if it had not been for the existence and operation of the Guarantee Fund Law. No one can tell how much more severe the reaction would have been in Nebraska. But no one can deny but that the state and the banks were saved from the full force of the blow that fell at that time.

Justice Holmes goes on in the opinion to further state:

> "We cannot say that the public interests to which we have adverted, and others, are not sufficient to warrant the state in taking the whole business of banking under its control. On the contrary, we are of opinion that it may go on from regulation to prohibition except upon such conditions as it may prescribe. In short, when the Oklahoma legislature declares by implication that free banking is a public danger, and that incorporation, inspection, and the above-described co-operation are necessary safe-guards, this court certainly cannot say that it is wrong."

And on petition for rehearing he further said:

> "The analysis of the police power, whether correct or not, was intended to indicate an interpretation of what has taken place in the past, not to give a new or wider scope to the power. The propositions with regard to it, however, in any form, are rather in the nature of preliminaries. For in this case there is no out-and-out unconditional taking at all. The payment can be avoided by going out of the banking business, and is required only as a condition for keeping on, from corporations created by the state. We have given what we deem sufficient reasons for holding that such a condition may be imposed."

We have here no tax upon the property of the banks which amounts to an involuntary taking of property. It is an imposition of a condition under the police power of the state. The property of the banks is not *taken for public use*. It is merely incidentally affected by a proper exercise of the police power.

The Supreme Court of North Dakota in discussing the Guarantee Fund Law of that state in the case of *Wirtz* v. *Vestos*, 51 N. D. 603, 200 N. W. 524, applied the rule laid down by Justice Holmes to the conditions which existed in North Dakota. In the opinion the court said:

> "It was settled early in the history of this state that the legislature could permit it to be conducted upon such conditions and subject to such regulations as it saw fit to prescribe, or even 'forbid it altogether.' In *State* v. *Woodmansee*, 1 N. D. 246, 46 N. W. 970, 11 L. R. A. 420, this court sustained the validity of the original act providing for the organization and government of state banks, saying, among other things, at page 250, in the official report (46 N. W. 971):

> "'But as a matter of precedent and authority, the legislative perrogative, in the exercise of its police power in promoting the public safety, not only to regulate and restrict the business of banking, but also to grant the right to one class, and to prohibit to others, or even to forbid it altogether, has never been questioned in the courts, and the legislature of other states have frequently exercised the right of supreme control over the business'."

The Supreme Court of South Dakota also applied the rule in the case of *First State Bank of Claremont* v. *Smith*, *supra*. In this case also the contention was made that the Guarantee Fund was wholly insolvent, served no public purpose and was a burden to the banks to such an extent as to amount to an involuntary taking of their property. But the court followed the reasoning of Justice Holmes and upheld the rule. In the opinion it was said:

> "So far as the banking corporations are concerned, the assessment sought to be prohibited is not a tax or involuntary taking of their property, but a part of the consideration exacted by the state for the corporate franchise. So, also, is the law a part of the privileges and conditions under which the unincorporated banks were organized and have been doing business."

PROPOSITION OF LAW NUMBER TEN

The distinction between rate and taxation cases and the case at bar involving the question of whether a special assessment levied under the Guarantee Fund Law is confiscatory is that the Guarantee Fund Law is not a revenue nor rate regulation measure but an act passed under the state's police power to stabilize banking conditions generally and in particular to protect deposits in

state banks, creating thereby intangible public benefits which cannot be judicially measured, and the payment of the Guarantee Fund assessment being a condition precedent to the operating of a state bank regardless of the earnings of the bank.

First State Bank of Claremont v. *Smith, et al.*, 49 S. D. 518, 207 N. W. 467.
Noble State Bank v. *Haskell*, 219 U. S. 104.

The proposition above set forth has been largely argued in connection with other propositions wherein the two cases referred to and other cases are cited and fully quoted. In the case of *First State Bank of Claremont* v. *Smith*, 49 S. D. 518, 207 N. W. 467, the court said:

> "So far as the banking corporations are concerned, the assessment sought to be prohibited is not a tax or involuntary taking of their property, *but a part of the consideration exacted by the state for the corporate franchise.* So, also, is the law a part of the privileges and conditions under which the unincorporated banks were organized and have been doing business."

And in *Noble State Bank* v. *Haskell*, 219 U. S. 104, the third paragraph of the syllabus is as follows:

> "The police power of a state extends to the regulation of the banking business, and even to its prohibition except on such conditions as the state may prescribe."

Manifestly, it is not competent for a court to consider the assessments wholly from the standpoint of their monetary value to the banks when there are other and controlling reasons of public welfare and benefit prompting the legislature to provide for these assessments and permit

their continuation. The question of the value of the assessments to the public and to the banks, and the related matter of the amount of and the effect of the assessments on banks must be considered as an entirety by the legislature and by the court.

PROPOSITION OF LAW NUMBER ELEVEN

Where a law is enacted in the exercise of the police power and has for its object the advancement of the public good, public safety or public welfare, there may be an incidental destruction of the value of private property or even destruction of the property itself without violation of the fifth or fourteenth amendments to the constitution of the United States, for it is not taken for public use without compensation or without due process of law, since it is not taken by the public at all, and the court will consider and determine only whether or not the law as enacted has any rational relation to the public good with every possible presumption indulged in the law's favor.

Powell v. *Pennsylvania*, 127 U. S. 678.
Mugler v. *Kansas*, 123 U. S. 623.
Lochner v. *New York*, 198 U. S. 45, 25 Sup. Ct Rep. 539.
State v. *Drayton*, 82 Neb. 254, 117 N. W. 768.
State v. *Withnell*, 91 Neb. 101, 135 N. W. 376.
6 R. C. L., Sec. 230, page 243.

The Guarantee Fund Law has heretofore been finally determined by the United States Supreme Court to have a rational relation to the public good. The state has always had the right in exercising its police power to enact measures which affect the property rights of citizens. This

right was inherent in the state before the adoption of the fifth and fourteenth amendments to the Constitution of the United States. And the Supreme Court of the United States has repeatedly held that these amendments are not violated by the proper exercise of the police power by the state.

With regard to statutes enacted by the state under their police power, there is only one question which the courts can determine, and that is whether the law as enacted has any rational relation to the public good, safety or welfare, with every possible presumption indulged in its favor. If it does not effect a palpable invasion of rights secured by fundamental law, judicial inquiry is at end. *Even though the property of an individual may be rendered valueless as an incident to the operation of the law, still there has been no taking of the property for public use without just compensation as prohibited by the 5th amendment to the federal constitution or any taking without due process of law as prohibited by the fourteenth amendment.*

The liquor and oleomargarine cases settled that question.

Mugler v. *Kansas*, 123 U. S. 623, 688, 699.
Powell v. *Pennsylvania*, 127 U. S. 678, 682.
Hadacheck v. *Sebastian*, 239 U. S. 394.
Pierce Oil Corp. v. *City of Good Hope*, 248 U. S. 498.

In *Powell* v. *Commonwealth of Pennsylvania*, *supra*, plaintiff in error was the owner of machinery and equipment of value only for the manufacture of oleomargarine. He contended that the law of Pennsylvania prohibiting the manufacture and sale of this article, rendered his property of no value and violated the Fifth and Fourteenth

amendments. This court held that the state had the inherent right under the police power and wholly apart from the provisions of the federal constitution to enact laws for the protection of the public interest and that the Fifth and Fourteenth amendments to the constituion of the United States did not prohibit the exercise of such power even though as an incident to the operation of the law the property of individuals was destroyed or the value of their property diminished. It held that the police power of the state existed before the adoption of the Fifth and Fourteenth amendments to the constitution and that the said amendments were not intended to and do not relate to the exercise of that power.

In the opinion it was said:

> "It is contended that the last statute is void in that it deprives all coming within its provisions of rights of liberty and property without due process of law and denies to them the equal protection of the law,—rights which are secured by the fourteenth amendment to the constitution of the United States. It is scarcely necessary to say that if this statute is a legitimate exercise of the police power of the state for the protection of the health of the people, and for the prevention of fraud, it is not inconsistent with that amendment; for it is the settled doctrine of this court that, as government is organized for the purpose, among others, of preserving the public health and public morals, *it cannot divest itself of the power to provide for those objects, and that the fourteenth amendment was not designed to interfere with the exercise of that power by the states. Mugler* v. *Kansas*, 123 U. S. 663, Ante, 273; *Union Co.* v. *Crescent City Co.*, 111 U. S. 746, 751, 4 Sup. Ct. Rep. 652; *Barbier* v. *Connolly*, 113 U. S. 27, 5 Sup. Ct. Rep. 357; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 6 Sup. Ct. Rep. 1064."

The banks complain in this case that they may by the further enforcement of this law be deprived of their property without just compensation because their buildings are adapted to and are valuable only as banking buildings. Such a result arising from their refusal to abide by the conditions imposed by the state and their going out of the banking business would not be depriving them of their property. It would, as in the above case, merely be a lessening of the value of their property as an incident to the exercise of the police power. That is not *"taking without just compensation"* or *"without due process of law" as forbidden* by the state and federal constitutions.

PROPOSITION OF LAW NUMBER TWELVE

The banks which are making fair or "extravagant profits" as admitted even by the trial court are not entitled to be relieved of their responsibilities to depositors with accrued claims by showing that hardship may be imposed by the operation of the law upon other banks of the state banking system.

Aetna Ins. Co. v. *Hyde*, 72 U. S. (L. Ed.) 357, 47 S. Ct. 113.

City of Grand Island v. *Postal Tel. Cable Co.*, 92 Neb. 253, 138 N. W. 169.

Ohio River Ry. Co. v. *Ditley*, 203 Fed. 237.

The court is confronted in this case with a rather unusual circumstance. The officers of two banks, the State Bank of Omaha and the Fremont State Bank, according to the evidence, initiated and caused this suit to be brought. The officers of these banks were the only bankers except An officer of the plaintiff bank, to appear upon the trial of the case as witnesses for the plaintiff.

Since its organization in 1912 the Omaha State Bank had accumulated surplus of $112,000.00 from earnings and in addition for seven years consecutively before trial had paid an annual dividend of 10% (Rec., p. 224, Qs. 1138-43). The Fremont State Bank had accumulated more than $30,000.00 additional surplus since 1920 and had continuously in addition paid an annual dividend of 8% (Rec., p. 311, Q. 394).

It hardly seems consonant with equitable principles for these banks with their "extravagant profits" to select one of the smallest banks in the state, one operated under the most adverse trade conditions, and one which is not in the least typical or representative of state banks of Nebraska, to be plaintiff in a suit for their benefit. *The president of the Abie State Bank testified that he did not even know the case had been brought or that his bank was named as party plaintiff until told by someone who heard the fact stated over the radio* (Rec., p. 178, Q. 785).

It is a well settled principle of law that no party is entitled to equitable relief against the enforcement of a law by showing that it works a hardship on others. (Though there was in fact no showing that it worked a hardship on any bank.)

This court in the case of *Aetna Ins. Co. v. Hyde*, 72 L. Ed. 357, had before it a case brought by the Aetna Insurance Company on behalf of itself and 155 other stock insurance companies doing business in Missouri, to contest a reduction of rates made under the state statute. The evidence showed that a hardship would be worked upon

some of the insurance companies of the state, but not upon the plaintiffs. The court in denying equitable relief, said:

> "No company receiving just compensation is entitled to have higher rates merely because of the plight of its less fortunate competitors. Companies whose constitutional rights are not infringed may not better their position by urging the cause of others. *Albany County* v. *Stanley*, 105 U. S. 305, 311, 26 L. ed. 1044, 1049; *Heald* v. *District of Columbia*, 259 U. S. 114, 123, 66 L. ed. 852, 854, 42 Sup. Ct. Rep. 434. As a practical matter of business, it is impossible in the long run for some companies to collect higher premiums than those charged by others in the same territory. *Rates sufficient to yield adequate returns to some may be confiscatory when applied to the business of others.* But the latter have no constitutional right to prevent their enforcement against the former. The 14th Amendment does not protect against competition. Moreover, 'aggregate collections' sufficient to yield a reasonable profit for all do not necessarily give to each just compensation for the contracts of insurance written by it. *It has never been and cannot reasonably be held that state-made rates violate the 14th Amendment merely because the aggregate collections are not sufficient to yield a reasonable profit or just compensation to all companies that happen to be engaged in the affected business.*"

The evidence showed that the state banks as a whole were in a better condition and making more money than they had been for several years past. A few of them may still be in poor condition, but nearly all of them are paying off and charging out their losses incurred during the deflation. Many are making very satisfactory and in some cases unconscionable profits. Will this court in order to enable the real parties instigating this suit to enhance their already "extravagant profits", hold that they can take

advantage of the condition or fancied condition of a few of the smallest banks operating under the most adverse circumstances to escape payment of the special assessments levied under the Guarantee Fund Law for the benefit of the public generally and depositors in failed banks in particular? We cannot conceive of this being done.

In *City of Grand Island* v. *Postal Telegraph Cable Co.*, 92 Neb. 253, the court said in part:

> "* * * * We are not aware of any case which holds that when the business transacted by one person or corporation of a class has proved largely remunerative, and the business of another of the same was less remunerative, or was in fact conducted at a loss, a court of justice can for that reason declare an occupation tax ordinance void."

In *Ohio River & W. Ry. Co.* v. *Dittey*, 203 Fed. 237, the court said that courts are not arbiters who "may overthrow a law which imposes a tax on privileges and franchises merely because in isolated cases such law imposes a hardship."

As a matter of fact it is the desire of the banks to charge off old bad debts which has prevented them practically all from paying from good to very large dividends.

There are 726 banks. On the matter of earnings it affirmatively appears that 570 of them had net earnings extending up to "extravagant profits", and after paying guarantee fund assessments and charging off admittedly old bad debts; and that these net earnings average with the 570 banks a fair return on the investment. Where in this record will the court find any evidence of the cause for the variation in earnings of the 570 banks; or find any

evidence as to the distribution to operating expense, operating income or other details with respect to such banks? The fact that they paid a specific amount to the guarantee fund took that amount of their earnings, but that of itself would prove nothing unless accompanied by proof of the effect of the guarantee fund on the earnings, eliminating for the purpose of the argument the main purpose of the guarantee fund, the protection of depositors, and not benefit to the banks.

PROPOSITION OF LAW NUMBER THIRTEEN

Even if the rule in the rate and taxation cases were applicable to the case at bar as contended by plaintiff, then plaintiff would have had the burden of producing detailed proof not attempted in this case to show the volume of business available to the several banks that have failed to make compensatory earnings, the facilities of such banks for handling the business offered, the efficiency and economy of the operation of such banks, that the condition complained of is not unusual or merely temporary, and to exclude all causes other than the effect of assessments paid; mere proof of loss or difficulty of operation for a period of a few years not being sufficient.

City of Grand Island v. *Postal Telegraph Co.*, 92 Neb. 253, 138 N. W. 169.

City of Fremont v. *Postal Telegraph Co.*, 103 Neb. 476, 172 N. W. 525, affirmed in 255 U. S. 124.

Powell v. *Pennsylvania*, 127 U. S. 678.

Ohio River and W. Ry. Co. v. *Dittey*, 203 Fed. 537.

Western Union Telegraph Co. v. *Borough of New Hope*, 187 U. S. 419.

Aetna Insurance Co. v. *Hyde*, 47 S. Ct. Rep. 113, 72 U. S. (L. Ed.) 357.

It is established that the reasonableness of a tax cannot be determined by the profit that some individuals make in their business. The fact that they are unable to conduct their business in such a way as to realize a profit which would warrant the amount of the tax is no argument as to the reasonableness or unreasonableness of the tax.

Inefficiency in management, peculiar local trade conditions, temporary business depression and in fact numerous simliar matters may affect the ability of one or a limited number of the banks to operate at a profit. Under the rule that "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a reasonable doubt," *Powell v. Pennsylvania*, 127 U. S. 678, the burden is upon the banks as to every one of these issues to show that a condition exists which would beyond question make the further operation of the banks impractical and to negative every possible state of facts consistent with the constitutionality of the law.

So, proof that a few individual banks are operating at a loss is not proof of the unreasonableness of the special assessment levied. Proof must be adduced that the loss is not due to mismanagement, lack of available business, abnormal losses due to depression following the war *or other causes*. Furthermore, an operating loss for a few years is not proof of anything; the period of time considered must be long enough to cover various business periods and show normal operating conditions.

In *City of Fremont v. Postal Telegraph Cable Co.*, 103 Neb. 476, affirmed by this court in 255 U. S. 124, the Nebraska Supreme Court said:

> "The proof in support of these allegations shows that during the years 1914 and 1915 defendant's Fre-

mont office was operated at a loss, and that a payment of the tax for these two years would occasion deficits on defendant's intrastate business at Fremont of $143.73 and $128.45 respectively. No figures are offered for any of the preceding years. *But, even if the evidence at hand is sufficient to warrant us in assuming antecedent and prospective losses in the operation of defendant's business at Fremont, we do not regard this as a satisfactory test of the reasonableness or unreasonableness of the tax involved. Defendant's losses may be due to conditions for which it is itself responsible.*"

Western Union Telegraph Co. v. New Hope, 187 U. S. 419

"And that the courts will not declare such ordinance void because of the alleged unreasonableness of the fee charged, *unless the unreasonableness be so clearly apparent as to demonstrate an abuse of the power on the part of the municipal authorities.*"

The banks failed entirely to produce the necessary proof on these points. No law will be declared invalid as unconstitutional by the courts unless it is manifestly so, unless there is no state of facts upon which it can be held valid. In order for the banks to prevail they must show that conditions as they exist are not the result of other causes than the assessments made under this law. This they have not done.

PROPOSITION OF LAW NUMBER FOURTEEN

Regardless of the general power reserved in the state of Nebraska by its constitution, to alter or amend banks charters, the state would have this right under the police power; the only restriction being that any measure adopted in the exercise of that power must be rationally

intended to serve some public purpose. Those questions in respect to the Nebraska Guarantee Fund Law are no longer open to question.

Noble State Bank v. *Haskell*, 219 U. S. 104.

Shallenberger v. *First State Bank of Holstein*, 219 U. S. 114.

Chicago, B. & Q. R. Co. v. *State*, 170 U. S. 57, 47 Neb. 549.

Douglass v. *Kentucky*, 168 U. S. 488.

Stone v. *Mississippi*, 101 U. S. 814.

Northwestern Fertilizing Co. v. *Hyde Park*, 97 U. S. 659.

Boston Beer Co. v. *Massachusetts*, 97 U. S. 25.

7 R. C. L., Sec. 105, page 106.

Mugler v. *Kansas*, 123 U. S. 623.

New Orleans Gaslight Co. v. *Louisiana Light & Heat Co.*, 115 U. S. 650.

Appellants devote large space in their brief to the power of the state to alter or amend the charters of the banks by the passage of the Guarantee Fund Law. This is no longer an open question.

The police power is a governmental function which cannot be alienated, surrendered or abridged by contract or grant of corporate charter. In *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 25, 33, it was said:

> The legislature cannot, by any contract, divest itself of the power to provide for these objects (*the public welfare*). They belong emphatically to that class of objects which demand the application of the maxim, *Salus populi suprema lex*; and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That dis-

> cretion can no more be bargained away than the power itself.

The only limitation under the reserve power or police power is that the alteration or amendment must have a rational relation to the public welfare. No one has or does question this. The Shallenberger case decided that issue in the affirmative with respect to the Nebraska law.

The courts are not concerned with any economic hardship or oppressiveness so long as the constitutional provisions are not violated. In *Powell* v. *Pennsylvania*, 127 U. S. 678, it was said:

> If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine as an article of food, their appeal must be to the legislature, or to the ballot-box, not to the judiciary. The latter cannot interfere without usurping powers committed to another department of government.

In 7 R. C. L., Sec. 105, page 106, the principle is well stated:

> "105. Harshness and Unreasonableness.—The general rule is that the question of the reasonableness of an act otherwise within constitutional bounds, is for the legislature exclusively, and in ordinary cases the courts have no revisory power concerning it, or to substitute their opinion for the judgment of the legislature. Courts are not at liberty to declare statutes invalid although they may be harsh, and may create hardships or inconvenience, or are oppressive or are mischievous in their effects and burdensome on the people and of doubtful propriety."

This court has held the enactment of the Nebraska law was a proper exercise of the police power. That ques

tion is settled. With that decision the jurisdiction of the judiciary ended. Since it was a proper exercise of the police power only the legislature can alter or repeal the law. The courts are not concerned with the results of the operation of a law enacted in the proper exercise of that power whereas under the record in this case, the evidence has shown conclusively that no constitutional limitations are being transgressed.

PROPOSITION OF LAW NUMBER FIFTEEN

Where the decision of a state court was on the basis of estoppel in pais involving a non-federal question and it appears that there was basis in fact for such holding, the supreme court of the United States will not take jurisdiction although an independent federal question may be involved. This court will not, where such non-federal question has some basis in fact, undertake to decide whether the decision of the state court on such question was right or wrong.

Arkansas So. R. Co. v. German Nat'l Bank, 207 U. S. 270, 28 S. C. Rep. 78.

Enterprise Irrigation District, et al. v. Farmers Mutual Canal Co., 243 U. S. 157, 37 Sup. Ct. Rep. 318.

St. Louis Malleable Casting Co. v. Prendergast Const. Co., 260 U. S. 469, 43 S. Ct. Rep. 178.

This question is fully considered and decided in *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.*, 243 U. S. 157, 37 Sup. Ct. Rep. 318. In denying jurisdiction it was said:

> "A decision of the highest court of a state adverse to the contention that, consistently with the due

process of law and equal protection of the laws clauses of U. S. Const. 14th Amend., an adjudication of the state board of irrigation in favor of the asserted right of a canal company, under an alleged priority of appropriation, to divert through its canal a certain amount of water from a stream, could not be treated as binding upon those claiming under other appropriations, because it was made without lawful notice or opportunity to be heard, *is not reviewable in the Federal Supreme Court on writ of error, where the state court also decided that the canal company was entitled to prevail for the reason that its adversaries were estopped by their own conduct to question the canal company's claims.*

"The contention that the highest court of a state, in disposing of some of the questions involved in a cause (case) *including that of a defense of an estoppel in pais, misconceived or misapplied the statute and common law of the state, and thereby infringed the due process of law and equal protection of the laws clauses of U. S. Const. 14th Amend., presents no Federal question which will sustain a writ of error from the Federal Supreme Court.*"

In *Arkansas Southern R. Co. v. German National Bank*, 207 U. S. 270, 28 S. Ct. Rep. 78, 52 L. ed. 201, the court said:

"Ordinarily this court will not inquire whether the decision upon the matter not subject to its revision was right or wrong."

The Nebraska Supreme Court was right in its findings of fact or the failure of proof by the banks and the question of estoppel. We submit no other decision was possible on the facts and record in this case.

PROPOSITION OF LAW NUMBER SIXTEEN

Under Section 9150, C. S. Nebraska, 1922, the Nebraska Supreme Court upon appeal in equity cases, is required to try the case de novo and to "reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence."

Colby v. Foxworthy, 80 Neb. 239, 115 N. W. 1076.

Sec. 9150, C. S. Neb. 1922 (hereinbefore quoted)

Enterprise Planing Mill Co. v. Episcopal Church, 100 Neb. 29, 158 N. W. 386.

Michigan Trust Co. v. City of Red Cloud, 69 Neb. 585, 98 N. W. 413.

Omaha Loan & Bldg. Assn. v. Hendee, 77 Neb. 12.

Milwaukee Mechanics Fire Ins. Co. v. Fuller, 53 Neb. 815.

The interpretation placed upon the Nebraska statute by the Nebraska Supreme Court is well stated in *Colby v. Foxworthy*, 80 Neb. 239, 115 N. W. 1076, in which it was said:

> From the citations of authorities it seems quite evident that counsel have overlooked the fact that, *under the statutes and the rules now in force for the trial of appeals in equity cases, we are not at all bound by the findings and judgment of the trial court*, but must try such cases *de novo*, reach our own independent conclusions as to the weight, credibility and effect of the evidence, *and render our judgment without reference to the conclusion reached by the district court, or the fact that the record contains some evidence to support it.*

Furthermore, a voluntary opinion of a trial court under the procedure in Nebraska is not a proper part of the

record on appeal and will be disregarded. In *Milwaukee Mechanics Fire Ins. Co. v. Fuller*, 53 Neb. 815, the court said:

> A second argument here is that the judgment must be reversed because the only issue in the case has not been passed upon or decided by the district court; *but this argument assumes that the opinion of the district judge is an essential part of the record of the case brought here.* [illegible] In every case brought here, either on error or appeal, while this court is always pleased to have the benefit of the written opinion of the trial judge, still the judgment of the district court must stand or fall upon the *statutory record of the case. That is the pleadings, the bill of exceptions made a part of the record.*

So upon this appeal the findings of fact and of law made by the Nebraska Supreme Court are the proper basis for review. The volunteer opinion of the trial court has no proper place at this stage.

PROPOSITION OF LAW NUMBER SEVENTEEN

Where the state supreme court has in the syllabus based its decision upon estoppel and has devoted fully two thirds of its opinion to the discussion of the evidence and facts establishing estoppel, it is frivolous to contend as appellants do, that because the words "waiver" and "estoppel" were not actually used in the opinion itself that it does not constitute one of the grounds of that court's decision.

Old Colony Trust Co. v. Omaha, 230 U. S. 100;
Rockford v. Hoover, 34 Sup. Ct. 291, 232 U. S. 162, 58 L. ed. 551.

Cuyahoga River Power Co. v. *Northern Realty Co.*, 37 S. Ct. 643, 244 U. S. 300.
Egan v. *Hart*, 165 U. S. 188, 41 L. ed. 680.

The banks now contend that the decision of the Nebraska Supreme Court on estoppel as announced in paragraph one of the syllabus should be disregarded as being only an abstract proposition of law not applied to the case. They ask this court to disregard the decision and discussion on estoppel as incorporated in the opinion. In support of this they cite *Holliday* v. *Brown*, 34 Neb. 232. This question, in an appeal coming to this court from Nebraska, was before this court in the case of *Old Colony Trust Co.* v. *Omaha*, 230 U. S. 100.

In that case it was contended by the City of Omaha that the opinion of the Nebraska Supreme Court should be disregarded in considering the propositions and findings stated in the syllabus. In deciding against the city on this point the court said:

> *To the state decisions here cited, counsel for the city interposes the objection that they are not well grounded, and that some of them go beyond what is expressed in the syllabus.* We need not say more of the first branch of the objection than that, as the decisions relate to matters of local law, namely, the construction of the state constitution and statutes and the powers of local municipal corporations, they must be regarded by us as controlling, when their application involves no infraction of any right granted or secured by the Constitution of the United States. Such an infraction is not suggested, nor could it reasonably be. *The other branch of the objection is not based upon any statute or rule of court in Nebraska, giving controlling effect to the syllabus. At most it rests upon a statement in Holliday* v. *Brown*,

> 34 Neb. 232, 51 N. W. 839, *respecting "an unwritten rule" to that effect, but what was said upon the subject in that case has been so pointedly criticized and so far restrained in Williams* v. *Miles*, 68 Neb. 479, 62 L. R. A. 383, 110 Am. St. Rep. 431, 94 N. W. 705, 96 N. W. 151, 4 Ann. Cas. 306, *that it is not controlling. Of course, it ought not to be given greater effect here than in the courts of the state.*

Both the opinion and syllabus by the Nebraska Supreme Court in this case are based on estoppel and they are in perfect harmony.

Clearly both the syllabus and opinion are before this court for consideration on all issues involved on this appeal.

PROPOSITION OF LAW NUMBER EIGHTEEN

The Nebraska Supreme Court is required by sections 1074 and 1075, C. S. Nebraska, 1922, to cause all of its opinions to be reported and published and they are therein referred to as the decision. Appellants have included the syllabus and opinion in the record brought to this court. Such syllabus and opinion are properly referred to in this court to establish the grounds of the judgment.

Old Colony Trust Co. v. *Omaha*, 230 U. S. 100.
Holliday v. *Brown*, 34 Neb. 232.
Williams v. *Miles*, 68 Neb. 790.

Section 1074, C. S. Nebraska, 1922, is in part as follows:

> "The court shall cause to be reported with as much brevity as practicable each of its decisions which reverses or modifies the judgment of the district court * * * * *."

Section 1075, C. S. Nebraska, 1922, as amended by Laws of Nebraska, 1929, chapter 84, insofar as material, is as follows:

> "It shall be the duty of the reporter of the supreme court to prepare the opinions of said court for publication as fast as they are delivered to him. * * * * He shall cause the same to be printed, and bound in a good and substantial manner, equal to volume fifty of said reports."

As shown by these statutes, the opinion is prepared by the court and is required to be published. The syllabus is also prepared by the court. *Holliday* v. *Brown*, 34 Neb. 232.

PROPOSITION OF LAW NUMBER NINETEEN

Where by statute or settled practice the opinion of the state court is a part of the record, this court will examine the grounds of the opinion in order to ascertain the grounds of the judgment.

Thompson v. *Maxwell Land Grant Railway Co.*, 168 U. S. 451, 42 L. ed. 539.

Burbank v. *Ernst*, 34 Sup. Ct. 299, 232 U. S. 162, 58 L. ed. 551.

Cuyahoga River Power Co. v. *Northern Realty Co.*, 37 S. Ct. 643, 244 U. S. 300.

Egan v. *Hart*, 165 U. S. 188, 41 L. Ed. 680.

The decision of the state supreme court with the grounds and reasons for the decision as given in the syllabus and opinion of the court are the basis upon which the Supreme Court of the United States has always decided the question of the grounds of jurisdiction.

Thompson v. Maxwell Land Grant Railway Co., 168 U. S. 451, 42 L. ed. 539:

> "Whenever a case comes from the highest court of a state for review, and by statute or settled practice in that state, the opinion of the court is a part of the record, we are authorized to examine the grounds of such opinion for the purpose of ascertaining the grounds of the judgment."

The same rule is applied in the following cases:

Burbank v. Ernst, 34 Sup. Ct. 299, 232 U. S. 162, 58 L. ed. 551.

Cuyahoga River Power Co. v. Northern Realty Co., 37 S. Ct. 643, 244 U. S. 300.

Egan v. Hart, 165 U. S. 188, 41 L. ed. 680.

The Supreme Court of Nebraska is required by sections 1074 and 1075, C. S., Nebraska, 1922, to cause all of its opinions to be reported and published, and they are therein referred to as the decision. This has always been the practice in that court and in this case as in all others coming to this court on appeal, the opinion as incorporating the decision, was included as a part of the record.

PROPOSITION OF LAW NUMBER TWENTY

If, pending a decision on appeal, a statute is enacted or an event occurs which renders a decision unnecessary, the appeal will be dismissed. The occurrence of such event may be shown by extrinsic evidence, or noticed by the court where it is a matter of judicial notice.

Lewis Publishing Co. v. Wyman, 228 U. S. 610.
Gulf, etc. R. Co. v. Dennis, 224 U. S. 503.

Wingert v. Hagerstown First Nat'l Bank, 223 U. S. 670.

U. S. v. Texas, 213 U. S. 297.

The major contention of the banks is that they will be unable to pay the annual special assessment of five tenths of one per cent *for an unlimited length of time* and that they will be unable to pay the existing losses to the depositors which they claimed totaled about sixteen million dollars. They do not object to the regular assessment of one tenth of one per cent. The record establishes that their contentions had no basis in fact or law.

However, for all practical purposes, and independent of this record, the contention of the banks as to the future, if it were a judicial question as they contend, has been rendered a moot question by the action of the Nebraska legislature. This court will take judicial notice of an act of that body. By Senate File Number 3 of the Session Laws passed by the 16th Special Session of the Nebraska legislature in March, 1930, about three months after the case was decided, the Guarantee Fund Law was modified so that the assessments for the future, including both the original regular assessment of one-tenth of one per cent and the special assessment of five-tenths of one per cent, were reduced to a total of two-tenths of one per cent per annum for a period of ten years; a total of $2.00 per thousand dollars of deposits.

Section four of this same act of the Nebraska legislature also provided that the Department of Trade and Commerce might in its discretion, grant to any bank an extension of time not exceeding three years within which to pay any of the assessments theretofore levied. These assessments referred to were the accumulation of the regular and special

assessments for the years 1928, 1929 and 1930. This accumulation was caused by the banks refusing to pay these assessments after this suit was brought and even after the Supreme Court of Nebraska had held against them. It may be assumed that they have largely set it aside and created a reserve fund against these accruing assessments.

So the only assessments now in issue are the special assessments which had already been levied and which amount to less than three million dollars and a future total assessment of only two-tenths of one per cent for ten years. That is the actual literal effect of the new act.

Assuming for the moment that the issue urged by the banks in this action as to the future were in any sense judicial, the practical effect of this action of the legislature is to render such issue a moot question. Under the facts and the record in this case we do not believe even the banks will contend that the payment of the special assessments already levied and the two-tenths of one per cent for ten years will in any way affect the state bank system of Nebraska.

PROPOSITION OF LAW NUMBER TWENTY-ONE

The judicial notice of the Supreme Court of the United States when reviewing a judgment of a state court is coextensive with that of the court whose judgment it is reviewing and includes notice of all the laws of that state.

Lloyd v. Matthews, 115 U. S. 222.

Liverpool, etc., Steam Co. v. Phoenix Ins. Co., 129 U. S. 377.

Chicago, etc. R. Co. v. Wiggins Ferry Co., 119 U. S. 615.

Hanley v. Donoghue, 116 U. S. 1.

Under the foregoing rule this court will take judicial notice of the modification of the Guarantee Fund Law by the Nebraska legislature in March of 1930.

Appellants' statements as to the Guarantee Fund Law in other states are wholly outside the record.

On pages 15 and 16 of appellants' brief, they purport to give some facts and figures with reference to the Guarantee Fund Law in other states. There is not a scintilla of evidence in the record or a word in the pleadings as to any of the matters they refer to and their statements are manifestly made in an attempt to prejudice the issue. We are unable to meet them without likewise going outside the record. We feel their statements under the circumstances will be entirely disregarded; they have no pertinent bearing on the issues.

Whatever the situation of fact is now or through the years in those other states may have been it does appear that NO COURT IN ANY OF THOSE STATES HAS EVER HELD ADVERSELY TO ANY GUARANTEE FUND LAW OR ANY PART THEREOF. Every case in every state and every one in the United States Supreme Court has been determined ON DEMURRER in favor of the law. The courts have consistently held all questions raised to be legislative matters. Plaintiffs cite no guarantee fund case supporting their theory; there are none; they try to differentiate the cases cited against them. Their own recitals outside the record as to the law in other states show that such action as has been taken has been by the legislature—not by the courts.

In the same connection they quote extensively from a "financial writer" as to the "economic policy" of the law.

Appellants' whole case in reality is based on the "economic policy" of the law. A matter exclusively for the legislature.

The banks have no standing in a court of equity.

The pitiful plight of depositors with accrued claims like Reverend Peterson and others is sufficiently disclosed by this record.

The old maxim of equity, "He who seeks equity must do equity", applies with special force in this case in favor of those depositors with accrued claims. It is difficult to understand how the banks can ask in equity to be relieved of their responsibilities under the law, when at the same time having received the benefits of the law, they seek to repudiate their liabilities to the depositors; on depositors' claims based on deposits the banks by their acts induced.

The banks are seeking affirmative equitable relief. Courts of equity have always refused to interfere in behalf of any litigant until he himself has done justice, according to equitable rules, to his opponent.

CONCLUSION

For the reasons given these appellees submit that the appeal herein should be dismissed for want of jurisdiction; or the decision of the Supreme Court of Nebraska be affirmed.

Respectfully submitted,

C. A. SORENSEN, Attorney General,

C. E. ABBOTT, Special Counsel,

Attorneys for Arthur J. Weaver, as Governor, Clarence G. Bliss, as Secretary, etc., and Willis M. Stebbins, as Treasurer, Appellees.

FILE COPY

SUPREME COURT OF THE UNITED STATES

(October Term, 19[illegible])

No. 39

ABIE STATE BANK, ABIE, NEBRASKA,

Appellant

v.

ARTHUR J WEAVER, as Governor of the State of Nebraska, and CLARENCE G. REED, as Secretary of the Department of Trade and Commerce,

WILLIS M. [illegible], as Treasurer of the State of Nebraska,

MARY E. SANDY, JAMES H. COVEY, THEODORE H. BEELE, HOFFMAN & SEYMOUR, INC. (a corporation), LEONARD N. SEYMOUR, JOHN HALLER and FRANK A. HEBENSTREIT,

Appellees.

APPEAL FROM SUPREME COURT OF THE STATE OF NEBRASKA

Brief of Appellees, Mary E. Gandy, James H. Covey, Theodore H. Beele, Hoffman & Seymour, Inc. (a corporation), Leonard N. Seymour, John Haller and Frank A. Hebenstreit

---

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34,881

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1930

No. 63

ABIE STATE BANK, ABIE, NEBRASKA,

Appellant

V.

ARTHUR J. WEAVER, as Governor of the State of Nebraska, and CLARENCE G. BLISS, as Secretary of the Department of Trade and Commerce,

WILLIS M. STEBBINS, as Treasurer of the State of Nebraska,

MARY E. GANDY, JAMES H. COVEY, THEODORE H. BEULT, HUFFMAN & SEYMOUR, INC., (a corporation), LEONARD N. SEYMOUR, JOHN HALBUR and FRANK A. HEBENSTREIT,

Appellees.

APPEAL FROM SUPREME COURT OF THE STATE OF NEBRASKA

Brief of Appellees, Mary E. Gandy, James H. Covey, Theodore H. Beult, Huffman & Seymour, Inc., (a corporation), Leonard N. Seymour, John Halbur and Frank A. Hebenstreit

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STATEMENT OF THE CASE

The appellant has appealed from a decision of the Nebraska Supreme Court in Abie State Bank vs. Weaver et al., 119 Neb. 153.

This action was begun in equity in the District Court of Lancaster County, Nebraska, by appellant and many other banks to enjoin the defendants, State Officers of the State of Nebraska, from levying and collecting the special assessments under the Depositors Guaranty Fund Law.

These appellees, interveners below, intervened in the action brought by appellant in the District Court of Lancaster County, Nebraska, as depositors in the failed State banks of the State of Nebraska on behalf of themselves and other depositors similarly situated whose accrued and adjudicated claims against the Guaranty Fund had not been paid.

During the trial these interveners introduced testimony and they participated throughout the trial of the case.

The pleadings of interveners (Supp. Rec. pp. 19-38) set forth in substance the following facts: That the respective interveners were depositors in the State banks of Nebraska and that the banks referred to were insolvent and were taken over by the Guaranty Fund Commission; that the deposits of interveners in such failed banks had not been paid as required by the Guaranty Fund Law of Nebraska, and could not be paid except by collection of the assessments, which were enjoined in this action; that the State banks of Nebraska received charters from the State, and that some had begun operation prior and some subsequent to the enactment of the Bank Guaranty Law; that the assessment herein attacked was levied for

the purpose of paying the accrued and adjudicated claims of depositors of failed banks; that there are no set-offs against or defenses to the claims of interveners: that the Guaranty Act of the State of Nebraska became a law in the year 1909, and has since that time with certain amendments thereto been in force and effect and that the plaintiff and all banks of the State of Nebraska have operated under said Act and have received and accepted the benefits of said Act and the amendments thereto; that the plaintiff and all other State banks have during that time invited and induced their customers to deposit and keep money in their banks by reason of the protection afforded to such depositors on account of said Act, and that the said banks represented that the depositors were securely protected by said Act, and that the banks by such means caused their customers to make and maintain large deposits in their banks, and that a large number of the past and present depositors in said State banks, among which were those of interveners, have been made and kept in said banks by reason of the conduct and representations of the plaintiff banks; that such deposits were accepted by the banks with full knowledge of their obligations to contribute to the Guaranty Fund; that the original Guarantee Act was enacted by the State of Nebraska for the regulation and protection of its trade and commerce, and as a proper exercise of the police power of the State; that under the Act the plaintiff and other State banks have constituted themselves an association for the protection of the depositors in said banks, and have been free to elect whether to accept the benefits and obligations under the Act or to surrender their charters and discontinue business, and that the plaintiff bank and all other banks have elected to receive the benefits and assume the burdens of the Act, and that such election has created a contractual relation between the State banks and interveners and between the banks themselves, and that each bank has obligated itself to pay the assess-

ments provided by law for the protection of the depositors of the banks; that of the 739 banks in the State, 180 banks have failed to join in this action and to release the other members of the association from their assessment and obligation; that the Guaranty Fund Act and its amendments constitute a valid part of the charter of each of the State banks of the State of Nebraska.

That under the Guaranty Fund Act as amended, a Guaranty Fund Commission was created for the purpose of assisting in the administration of the Depositors Guaranty Fund; that since the original enactment of the law 264 State banks have become insolvent; that 129 of said banks have been liquidated and their depositors paid in full from the assets of said banks, supplemented by assessments as provided in the Act; that a number of insolvent State banks are now under the control of the Guaranty Fund Commission; that since the enactment of the law there has been paid into the Guaranty Fund by the banks an amount in excess of fifteen million dollars; that assets of great value of a number of failed banks are in possession and under control of the Guaranty Fund Commission and are being liquidated through such commission for the benefit of the banks in whose behalf this action was brought and the other State banks of the State of Nebraska; that the assessment involved in this action was made in order that cash might be presently available to meet the obligations of payment to interveners and other depositors similarly situated; that the regular annual assessment of 1/10 of 1 per cent of the average deposits under the Guaranty Fund Act provides funds only sufficient to pay the cost of administering the Act; that at the time of the commencement of this action the State banks of the State of Nebraska were in a prosperous condition, and were in better position to pay the assessments to the Guaranty Fund than at any time since the enactment of the law; that under present condition of the banks, the special assessment of 5/10 of 1 per cent can be paid by them

without confiscation of property or injury to their business; that the banks are quasi public corporations and that the intervener depositors with adjudicated claims are entitled to payment of their deposits.

The interveners prayed for the dismissal of the petition and for other relief. (Answer and Cross-petition Mary E. Gandy, Supp, Rec. pp. 19-28), (Answer and Cross-petition of James H. Covey, et al Supp, Rec. pp. 28-40).

Interveners Frank A. Hebenstreit and John Halbur demurred to the petition of the plaintiff banks (Supp, Rec. pp. 17-18).

Issues were joined upon the pleadings of interveners and upon the trial the plaintiff banks prevailed in the lower State Court. (Rec. pp. 41-57).

Upon an appeal being taken to the Supreme Court of the State of Nebraska the decision of the District Court was reversed. (Abie State Bank vs. Weaver, 119 Neb. 153).

Thereafter this appeal was prosecuted by the Abie State Bank on behalf of itself as appellant.

Appellees will, in submitting statement of the case, supply certain omissions and call attention to certain inaccuracies in the brief of appellant and in order to avoid repetition, interveners adopt by reference brief of appellees, Weaver as Governor et al., except however, interveners do not concede the propriety in this action of the references on pages 134, 214 and 217 of appellees' brief, being their Propositions of Law number 20 and 21, to certain legislation purporting to repeal the Guaranty Fund Act, which was passed at the Extraordinary Session of the Legislature of Nebraska during March, 1930, for the reason these appellees contend,

even admitting for the purpose of argument, and for no other purpose, the right of the Legislature to repeal the Act, such legislation does not cause the issue in this cause to become moot so as to prevent the consideration by this Court, because the liabilities to interveners were adjudicated and fixed as claims during the time the special assessment herein attacked was in full force and effect.

Appellant contends that the special assessment provided for in the Guaranty Act is confiscatory, that it results in the taking of its property without due process of law, and therefore is violative of the Fourteenth Amendment to the Constitution of the United States, and that under present conditions the Act cannot reasonably accomplish the apparent purpose for which it was enacted.

STATEMENT OF THE EVIDENCE (Supplementary)

The evidence introduced upon trial of the case was voluminous, but was not greatly conflicting. Portions of the evidence has been set up in appellant's brief and other portions in the brief of appellees, Weaver et al. These appellees set forth only portions of the evidence which are necessary to supplement such statement and which should have consideration by the Court.

A considerable portion of the evidence consists of tabulations, reports and statements of auditors which are, for the most part, incomplete, in that the tabulations submitted on behalf of appellant cover only a portion of the banks of Nebraska. Almost all of the oral testimony introduced on behalf of the banks consists of opinions or speculations of the various witnesses, for illustration, the testimony of witnesses Peterson, Stephens, and Schantz.

180 of the 739 banks of the State were not parties to this action and no testimony relative to these banks was submitted.

It is believed that, taken in conjunction with the statement of evidence in other briefs, the following statement will permit the Court to have before it the salient facts without necessity of having recourse to the record for a complete understanding of the matters at issue.

These appellees have refrained from a quotation of figures for the reason that much of this data is provided in the other briefs.

Appellant, to sustain its contention that the Act is confiscatory, submitted evidence which purports to show that a considerable number of the State banks are in unsatisfactory financial condition and that only a portion of the banks have been able during recent years to earn satisfactory dividends upon the capital invested.

In support of this contention of appellant, the tabulation prepared by the witness, Mooney, was offered and received in evidence. However, the witness testified that in making the conclusions relative to profits of the banks, he compiled data only as to those which were earning net profits of less than six per cent on their capital (Rec. p. 134, Qs. 371-372) and (Rec. p. 142, Qs. 441-442), and so it is disclosed that in such compilation instead of showing facts as to individual banks in relation to their size, their territory and potential possibilities, information is produced only with reference to banks which are admittedly unsuccessful without disclosing the cause of their lack of success and their present inability to operate profitably and earn dividends.

Appellant shows that the going banks had on hand about the time of the commencing of this action a large amount of "other real estate" and that this real estate

was carried on the books of the bank at an excessive value. (Rec. pp. 155, 157, and 158, Qs. 579, 581, 581).

The evidence discloses also that it was reported to the bankers of the State in 1927 that between 350 and 400 banks would have their capital impaired if paper criticized by the examiners was charged off (Rec. p. 160, Q. 594) although a number of these banks would have had only slight impairment if their losses were charged off. (Rec. p. 162, Qs. 608-609).

All of the banks in Nebraska under the Act made money from the years 1910 to 1920. At that time loans were being made on real estate equities and because of excessive amounts of money in banks, the bankers frequently solicited persons who were not customers to borrow money from the banks to engage in speculation. (Rec. pp. 241-242, Q. 1244). From the year 1920, because of a drop of prices of farm lands and farm commodities and general deflation there were many losses. There would have been many bank failures and losses in banks if there had been no fall in prices because of the recklessness in making loans. (Rec. pp. 241-243, Q. 1246). The causes of many failures of the banks were incompetency and a betrayal of trust in addition to the natural depression after the war. (Rec. pp. 241-245). Nebraska had too many banks. At one time it had an average of one bank for each 1200 people. (Rec. pp. 245-246, Q. 1259).

The Guaranty Fund Act assessments from 1923 to 1928 did not contribute to the failure of banks during the period and were a steadying influence on deposits (Rec. pp. 246-247, Qs. 1263-1264), and by reason of the Guaranty Fund Act the deposits in the State banks increased at least one hundred million dollars. (Rec. p. 247, Q. 1265). The condition of the State banks was incomparably better in 1928 than in 1923. (Rec. p. 248, Q. 1271).

A bank properly conducted with adequate capital should be able to pay the assessments (both regular and special) of six-tenths of one per cent on their average deposits, and if unable to do so, it should not survive. (Testimony of witness, Stephens, Rec. p. 542, Qs. 3471-3473).

The evidence discloses that the unsatisfactory condition of the going banks at the present time and the failure of other banks were caused by losses which occurred by reason of business done during the years from 1910 to 1920, and that the present situation is the result of the previous speculation (Rec. pp. 107, 108, Qs. 213-214). The majority of the State banks could pay the Guaranty Fund assessment without material disadvantage or impairment of their capital. (Rec. p. 210, Qs. 1054-1055).

One half of the banks would not have closed if there had not been inefficiency upon the part of the officers, (Rec. p. 112, Q. 255), and evidence of fraudulent conduct on the part of the officers of the banks was found in a large number of the banks and was a material item in the losses of the banks. (Rec. pp. 118-119, Qs. 304, 305 and 306).

With reference to the Abie State Bank, it is disclosed by the evidence that the bank was located in a town of 200 people, that it had a capital of $15,000.00 and a surplus of $2,500.00, but the capital had been increased from $10,000.00 to $15,000.00 by earnings, and the bank had paid dividends up to the year 1921, and also paid dividends during the year 1926; that the dividends paid were from ten per cent to fifteen per cent. In 1928 the deposits in the bank were $182,000.00 and the loans and discounts were $159,000.00. The bank had a salary account of $3,180.00 a year, paid interest on deposits of $5,807.38 and had other expenses of $2,079.63. (Rec. pp. 167, 176. There were banks in other towns at a dis-

tance of 4, 6, 9 and 15 miles respectively and these banks were strong competitors. (Rec. pp. 174, 175 Q. 749, 759). The bank had charged off paper before and was carrying other real estate as a result of a loan made to a relative and other loans had been made to relatives in the amount of $4000. (Rec. pp. 179-180, 184). The bank had received public deposits without giving bond up to the year of 1928 and generally depositors had been told they were protected by the Guaranty Fund Act. (Rec. p. 184. Q. 839-842-843).

There is nothing in the record which discloses that the Abie State Bank was conducted in a proper manner and in accordance with good banking practices. It is disclosed that the bank has not paid dividends during recent years with the exception of one dividend in 1926, but so far as the proper operation of the bank is concerned, the record is silent.

The State Bank of Omaha of which Mr. Schantz was president and the Fremont State Bank of which Mr. Stephens was president were highly successful banks and were being operated at large profits.

EVIDENCE AS TO WAIVER AND ESTOPPEL

In May 1927 a report was made to the bankers of the state as to the condition of the Guaranty Fund and as to the conditions of the banks throughout the State. (Rec. p. 198. Q. 927 to 930). During the year 1926 and during 1927 the banks of the State carried on an extensive advertising campaign and attempted to induce the making and maintaining of deposits by reason of the existence of the Bank Guaranty Act. A Legislative committee of the State Bankers Association sponsored and submitted legislation some of which was later enacted and which affected the operation of the Guaranty Fund Act. (Rec. p. 240 and Sup. Rec. pp 52 and 55).

The information was given to the bankers of the State that many of the going banks were in a bad financial condition and if worthless paper was charged off, the capital of many of the banks would be impaired. (Rec. pp. 189-191). During the various sessions of the legislature bankers from various districts throughout the State were represented and participated in hearings before the legislative committees relative to proposed amendments of the Guaranty Fund Law.

The bankers of the State urged the amendment of the Guaranty Fund Law at the Legislative Session in 1923. The purpose of this law was to give bankers an active part in the settling and closing out of failed banks, and they advocated that the Guaranty Fund Commission be composed of bankers nominated by themselves. Discussions relative to the Act were conducted for sometime before its passage. (Supp. Rec. pp. 52-54).

The fact of a deficiency in the Guaranty Fund in the amount of three million dollars was known to the bankers of the State in 1925 and they continued thereafter to advertise the security of the Guaranty Fund and its advantages to depositors in banks. (Rec. p. 548). In August, 1927, a letter was sent to each bank in the state of Nebraska advising it that the net liabilities of the Guaranty Fund were at that time in excess of six million dollars.

The banks thereafter continued their advertising and the Fremont State Bank ran an advertisement on January 25th, 1928 in reference to the security of deposits under operation of the Act and The State Bank of Omaha on March 10th, 1928, and thereafter, circulated documents referring to the Guaranty Fund Law and its advantages. (Rec. pp. 627, 629).

The signs in and upon the premises of the various banks in the State which referred to the security of de-

posits under the Act were generally maintained until a short time previous to the institution of this action on December 21, 1928.

Checks furnished depositors, deposit slips and the bank stationery generally carried the wording that the deposits in the bank were protected by the Guaranty Fund Law up to the date of the institution of this action.

The first definite information relative to the condition of the Guaranty Fund and the large deficits which had arisen in said fund were given to the public through a newspaper article which was published only a short time before the institution of this action.

EVIDENCE RELATIVE TO STATUS OF INTERVENERS AS DEPOSITORS

The status of these appellees interveners below as depositors in the respective banks is shown by stipulations appearing in Supp. Rec. pp. 45 to 47 and testimony of Witness Hebenstreit (Supp. Rec. pp. 47 to 50), also stipulation. (Rec. pp. 358 to 360 Inc.).

Under these stipulations interveners are shown to be depositors in failed banks whose claims are for the most adjudicated and whose deposits were made by reason of advertisements of the banks and the holding out by the banks of the advantages and security of the bank depositors Guaranty Fund, and in reliance thereon.

CONTENTIONS OF INTERVENERS

The contentions of interveners in this cause are:

1. That the decision of the State Court is based on Federal and non-Federal questions, and by reason of the fact that the decision of the Federal question was not

necessary to the determination of the case, the Supreme Court of the United States will not take jurisdiction.

2. That this precise Guaranty Fund Act and the assessments provided thereunder have been held not violative of any provision of the Constitution of the United States.

3. That the Legislature has the right by proper regulatory measure to control the quasi public business of banking within the State, and that the court should not interfere with the exercise of this legislative function.

4. That the Act prescribes a contract between the banks and the depositors, and under this contract the rights of the intervening depositors have accrued.

5. That the banks have failed to sustain their contention that the special assessment provided in the Act, as a matter of fact, is confiscatory or that it deprives them of their property without due process of law.

6. That the banks have waived their rights to question the constitutionality of the Act by accepting benefits thereunder over a long period of years, and should be estopped from contesting the collection of the special assessment enacted to pay net liabilities to depositors accruing under the Act.

ARGUMENT

SUMMARY OF ARGUMENT

These interveners have immediately above set forth six points, which they have elected to call Contentions, summarizing the Argument and hereinafter have set forth the additional point that the question before this Court is not moot.

These seven points or contentions are hereafter recited, followed by the argument and citations in support of each.

These contentions pertain: (1) to the jurisdiction; (2) to res adjudicata; (3) to the exercise of police power; (4) to contractual rights of interveners; (5) to failure of appellant's proof; (6) to waiver and estoppel; (7) to substantial interest of interveners.

Contentions 1, 2, 3 and 5 are impersonal and formal, while 4, 6 and 7 have reference to the material and pecuniary interests of the intervening depositors.

The appellees, Weaver et al., and the intervening appellee, Stebbins, have no personal pecuniary interest in the result of the action.

APPELLEES' CONTENTION NUMBER 1

THAT THE DECISION OF THE STATE COURT IS BASED ON FEDERAL AND NON-FEDERAL QUESTIONS, AND BY REASON OF THE FACT THAT THE DECISION OF THE FEDERAL QUESTION WAS NOT NECESSARY TO THE DETERMINATION OF THE CASE, THE SUPREME COURT OF THE UNITED STATES WILL NOT TAKE JURISDICTION.

Appellees respectfully suggest that where the decision of the lower court, of which complaint is made, was based partly on Federal and partly on non-Federal questions, if the non-Federal question would control the case, the Supreme Court of the United States will not accept jurisdiction although the Federal question is involved, if the decision on the non-Federal question is reasonably supported by the record.

Adams vs. Russell, 229 U. S. 353.

People ex rel Doyle vs. Atwell, 261. U. S. 590.

Arkansas Southern Ry. Co. vs. German National Bank, 207 U. S. 270.

Numerous other cases might be cited to sustain this position.

In the instant case, the State Supreme Court reversed the decision of the lower court, and after devoting a considerable portion of its opinion to a consideration of the acts and conduct of the banks in soliciting, and maintaining deposits, found that the banks had waived their right to question the constitutionality of the Act of which they had benefit.

Abie State Bank vs. Weaver, 119 Neb. 153.

The decision of the State Court to the effect that the banks have waived the right to question the constitutionality of the Act clearly brings this case within the rule announced in numerous cases decided by this Court. The decision of the Federal question as to the constitutionality of the Act was in no manner necessary to the decision of the case.

Under the rule in this Court where State statutes require a decision of the highest State Court to be in writing, stating the grounds of the decision, the Supreme Court may, in determining its jurisdiction, examine the written and recorded opinion to ascertain the grounds of the judgment of the State Court.

Thompson vs. Maxwell Land Grant & Railway Co., 168 U. S. 451.

Dibble vs. Bellingham Bay Land Co., 163 U. S. 63.

Under the statutes of the State of Nebraska, the Supreme Court is required to render its opinion of reversal in writing and to state the grounds of the decision. Sections 1074-1075, Comp. St., Nebr., 1922.

Appellant concedes that the rule governing the opinions of the Supreme Court of Nebraska, is that the syllabus is prepared by the court and that the syllabus sets forth the decision of the court on the matter at issue.

But the appellant contends that the opinion and the syllabus are not in accord. It would seem clear that after the court had reviewed the evidence affecting waiver in the opinion, that the section of the syllabus which states that "the Banks should not be heard in a proper case to make complaint" would apply to the opinion in the case as the court would have no occasion to record an opinion in the syllabus which had no application to the facts and findings set forth in the body of the opinion. The syllabus and opinion combined constitute the holding of the court.

It seems clear, by reason of the extended reference in the case as to waiver, that not only the Justice who wrote the opinion, but the entire court rested the decision, at least in part, on the non-Federal ground of waiver. It was an outstanding issue raised by pleadings and supported by evidence.

The contention in appellant's brief, relative to the adoption by the State Supreme Court of the findings of the lower court, would seem to be based upon a most faulty premise. Under the Nebraska law, Section 9150, Comp. St. Nebr. 1922, the Supreme Court is required on appeal in equity cases to try the case de novo, and while it is true that the trial court did find that the banks had waived their right to question the constitutionality of the Guaranty Fund Act, it also found that public pol-

icy prevented the banks from waiving the right or being stopped to question the constitutionality of the law.

It must be presumed in accordance with the statute that the Supreme Court instead of adopting the finding of the lower court upon the trial de novo made its independent finding of fact in its decision since it reversed the decision of the lower court. It, in fact, did refuse to adopt such findings and from the report of the judgment, it is clear that it had found that the findings of the lower court upon the facts were erroneous. (119 Neb., supra).

The record discloses that the Supreme Court did have a substantial basis for its findings that the banks have waived their right to raise the question of constitutionality, and investigation need not go beyond the statement in the opinion of the court itself to substantiate this fact.

It is shown in the evidence and commented upon by the court that a definite result of increased deposits had been secured by reason of the aggressive action of the banks by advertising the advantages to depositors and the security afforded to depositors in banks by reason of the operation of the Guaranty Fund Act, and that numerous deposits were made and maintained in banks by reason of direct representation to the depositors that their deposits were amply protected under the law.

The Supreme Court of Nebraska, in its opinion, regarded the constitutionality of the Act as having been sufficiently decided, and apparently, having accepted that fact, has said by inference that, even if the Act were unconstitutional, the banks might not question the constitutionality under the facts of the case.

The force of this contention of appellees is more apparent in light of the fact that the constitutionality of the Act had been heretofore passed upon by the Supreme Court of the United States.

Shallenberger vs. First State Bank of Holstein, 219 U. S. 114.

The court in its decision recognized that fact and specifically referred to the case of Noble State Bank vs. Haskell, 219 U. S. 104, and to the reasoning of the court in that case, and the Nebraska Supreme Court recognized that the constitutionality of the Act had been decided and its decision, therefore turned upon the waiver.

This Court has held that where a Federal question which has been raised had been explicitly decided, and where the subject matter of the controversy was not inherently Federal, a writ of error would be dismissed.

Equitable Life Ins. Co. vs. Brown, 187 U. S. 308.
King vs. West Virginia, 216 U. S. 92.

In view of the fact that the non-Federal question alone was sufficient for the determination of this case, and in view of the further fact that the constitutionality of the Act in question has been heretofore determined by this Court, it is submitted that the Court will not take jurisdiction of the case upon this appeal.

APPELLEES' CONTENTION NUMBER 2

THAT THIS PRECISE GUARANTY FUND ACT AND THE ASSESSMENT PROVIDED THEREUNDER HAVE BEEN HELD NOT VIOLATIVE OF ANY PROVISION OF THE CONSTITUTION OF THE UNITED STATES.

It is appellees' contention that the case of Shallenberger vs. First State Bank of Holstein, 219 U. S. 114, directly adjudicates the matter at issue in this case and the Shallenberger case is based upon the decision in

Noble State Bank vs. Haskell, 219 U. S. 104 and 219 U. S. 575.

Extended comment is made throughout the briefs herein to the decision in the Noble case, and it is true that the Noble case is regarded as a definite decision of the constitutionality of a Guaranty Fund Law generally, and the Shallenberger case as an adjudication of the constitutionality of the Nebraska Guaranty Fund Law specifically.

It is interesting to observe that, although guaranty fund laws have been enacted in various states and have been subject to attack in the courts, in no instance has any court of last resort held the law unconstitutional. Without reference to the result of the operation of the law, the right of the State to regulate for itself the business of banking has been constantly recognized.

In light of the fact that such extended comment has been made upon the Noble case in the briefs, it will suffice if appellees comment only briefly upon it.

Appellant's reasoning to the effect that the rule in the Noble case is not applicable at the present time and under present conditions of the banks, would, it seems to appellees, refute itself. This Act has been in force and effect in the State of Nebraska for many years and apparently has accomplished the result which was intended. The effect of the operation of the law has been to stabilize the business of banking in the State. It has increased the deposits in the State banks. It has for many years caused the depositors in failed banks to be paid the amount of their deposits in full within a short time after the failure of the bank. It has conferred a direct benefit upon the entire community.

It is disclosed by the record that the Guaranty Fund Law is not the cause of any asserted unsatisfactory condition of the banks, but that in fact the condition claimed has been caused generally by matters entirely

within control of the persons managing the banks. Certainly, it cannot be contended that incompetency, dishonesty or bad banking practices can be laid at the door of the Guaranty Fund Act.

Appellant shows that some of the banks in the State are in a condition verging upon insolvency and that many others cannot earn dividends. It is also shown that many of the banks, which joined as plaintiffs, are in a good condition and are earning dividends, and can without detriment pay the assessments under the Act. Moreover many banks did not join in the action to resist such payment.

Apparently, the reasoning of appellant is, therefore, that by reason of the existence of an economic condition, which it must be presumed is only temporary, the operation of the Act, in so far as the assessments are concerned, is rendered unconstitutional, and therefore the rule in the decided cases has no present application.

In considering the Noble and Shallenberger cases, as shown by the opinion in the Noble case, this Court had before it those facts which were properly set forth in the petitions in those cases, and there considered the same phases of the case now presented. It is true that the Court in its opinion made reference to an "insignificant taking" as being justified, even where its immediate purpose is apparently a private use, but it is interesting to observe that the "insignificant taking" referred to in the Noble case was double the taking complained of in the instant case.

Appellant contends that the decision in the Noble case was purely academic, and that the Court inferentially permitted the Legislature to speculate as to the result of the operation of the Act but now, the Act having been in force and effect, the results attained are before the Court.

The decision of the Court in the Noble case was most definite. The Act and the assessments provided there-

under were held to be a proper exercise of the police power of the State, and the Court found that the assessments provided for by the Act not confiscatory. It is suggested by appellees that nothing has been shown on the part of appellant which would remove the present operation of the Act beyond the rule laid down in the Noble case.

It is disclosed in the record in the instant case that the evidence is direct to the effect that properly managed banks with adequate capital can pay the present assessment without embarrassment, which result in no way is in conflict with the decision of the Noble case. However, appellant nows asks the Court to declare the law unconstitutional because of the fact that certain, but not all banking institutions, cannot operate at a profit during the current deflation period, and the Abie State Bank does not offer evidence to advise the Court that it is either properly managed or is provided with adequate capital, or that there was banking business to sustain it; nor does it show that it cannot pay the Guaranty Fund assessment, although the record does disclose by reason of its location with its limited deposits and loans, and its method and cost of doing business, it does not operate at a profit.

Conceding the law to be that an Act under one state of facts might be proper, and under another improper, so far as its constitutionality is concerned, appellees respectfully submit that where the present condition is in a large measure brought about by the acts and conduct of the person complaining of the Act, this condition provides no cogent argument to induce the Court to change a former decision and now declare the Act unconstitutional. Certainly there is no reason for such holding where the record is destitute of evidence that any bank would have adequate earnings except for the assessment complained of.

The action of appellant is a direct attack upon the Act itself, although this attack is apparently directed

only against the special assessments. Nowhere does appellant in its brief concede that any assessment under the Bank Guaranty Fund Act would be constitutional. No distinction is made between prosperous banks and failing banks. Appellant would have the Act held unconstitutional as to both classes.

The decision in Noble vs. Haskell, supra, has been followed in Assaria State Bank vs. Dolly, 219 U. S. 121, and it has been recognized as a rule of law by the courts in the various states.

The fact that the decision of these cases has entered into the business transactions of the State, and has been acted upon as a rule of contract and property, appellees believe, gives a basis for their contention that the constitutionality of the Guaranty Fund Act has been adjudicated, and such adjudication has been conceded and accepted and acted upon by all parties affected.

This Court has frequently taken into consideration long acquiescence in constitutionality of the statute and the fact that a rule of property has developed as a result of its decision.

Elzaburu vs. Chaves, 239 U. S. 283.
McDougal vs. McKay, 237 U. S. 372.
Reynolds vs. Fewell, 236 U. S. 58.
Truskett vs. Closser, 236 U. S. 223.

Hereinafter appellees will make reference to numerous decisions of the Nebraska Supreme Court in which the controlling decision in the case at bar has been cited and which interpret the various features of the Act in derogation of previous settled law. The banks as well as depositors have invoked the action of the courts and received the benefits of numerous decisions premised upon the constitutionality of the Act.

The cases, 87 in number, were decided by the Supreme Court of the State of Nebraska in which the Bank

Guaranty Fund Act was construed. A brief reference to the matters decided in the various cases is set out in Appendix "A," which is attached to this brief.

Further argument will be addressed to the condition of the banks of the State of Nebraska, as disclosed by the record, in the argument under appellees' contention relative to failure of proof on the part of the banks in this case.

It is respectfully submitted under the decisions of the Noble vs. Haskell and Shallenberger vs. Bank cases, that the matter in issue in this case has been directly adjudicated and that the constitutionality of the Depositors Guaranty Fund Act of the State of Nebraska is res adjudicata.

APPELLEES' CONTENTION NUMBER 3

THAT THE LEGISLATURE HAS THE RIGHT BY PROPER REGULATORY MEASURE TO CONTROL THE QUASI PUBLIC BUSINESS OF BANKING WITHIN THE STATE, AND THAT THE COURT SHOULD NOT INTERFERE WITH THE EXERCISE OF THIS LEGISLATIVE FUNCTION.

It is a recognized rule of law that the police power of the State extends to the regulation of banking business.

Noble State Bank vs. Haskell, 219 U. S. 104, 219 U. S. 575.

Shallenberger vs. First State Bank of Holstein, 219 U. S. 114.

Engel vs. O'Malley, 219 U. S. 128.

The basis for the exercise of the police power of the State is for "the greatest welfare of the people," and the cases cited by Mr. Justice Holmes in the Noble case are clearly illustrative of the attitude of the Supreme Court of the United States in cases where the Legislature has clearly considered the public benefit, and where the Act will reasonably accomplish the result intended.

Bacon vs. Walker, 204 U. S. 311.
Offield vs. Railway Company, 203 U. S. 372.
Strickley vs. Ore Mining Co., 200 U. S. 527.

The business of banking is of such vital importance in the world of modern business that local communities are most seriously injured by losses due to failures. By reason of the present method of conducting business, banks have become the necessary agency for the clearance of almost every business transaction and the current funds of the community flow through the banks, and any cause which impedes the flow necessarily upsets the business equilibrium and directly affects every citizen. Because of the importance to the community it is clearly proper that the Legislature should take steps to attempt to insure against this loss and assure the consequent stability.

The failure of the Guaranty Fund Act in various states, adverted to by the appellant in its brief, in the opinion of appellees, gives no weight to the contention that the Act is an improper exercise of the police power. The history of the improper administration of the Act, the amendments to it obtained by the bankers resulting in destroying its effectiveness, and the lack of support by the bankers, except when operating to their benefit, are matters that should be considered by the Court before it takes cognizance of appellant's conclusion that the Act has not proven satisfactory wherever tried—should such conclusion seem material.

The refusal of the courts to interfere with this proper legislative function has been definitely recognized.

Fallbrook Irrigation Dist. vs. Bradley, 164 U. S. 112
Strickley vs. Highland Boy Gold Mining Co., 200 U. S. 527.

The courts, wherever possible, are inclined to sustain the holding of the local courts with reference to validity of a statute for the reason that the local courts are presumed to know and appreciate local conditions and the results to be obtained from the operation of the Act.

Clark vs. Nash, 198 U. S. 361.

The Court will favor the construction which will uphold the statute unless it is plainly in violation of the provisions of the constitution.

U. S. vs. Standard Brewery, 251 U. S. 210.
Texas vs. Eastern Texas R. Co., 258 U. S. 204.
Bratton vs. Chandler, 260 U. S. 110.

Banking under section 7983 Comp. St. Nebraska 1922 is declared to be quasi public business.

The Act under consideration here has bestowed direct and indirect benefits on the public of the State of Nebraska, and in spite of the opinion of economists and bankers as to the faults of the legislation, its results must be measured locally. Lack of wisdom on the part of the Legislature in enacting the law, in the view of the court, is not a ground for interference by such court with this purely legislative function.

No evidence has been produced on the part of the banks which affects the constitutionality of the Act or the assessments levied under the Act, in so far as present existing conditions are concerned, and the mere fact that a period of deflation, following a period of inflation and speculation, has affected the banks to their detriment cannot, in the opinion of appellees, take from the State the right to regulate its banking business and impose proper charges in carrying out that purpose. The money of appellees was received and invested during such periods of inflation and it must be repaid irrespective of changed conditions.

The statute in this case had been in full force and effect for nearly twenty years at the time of the commencement of this action, and its constitutionality had been adjudicated. (219 U. S. 114, supra.).

Appellees submit that the Act has a proper relation to the public welfare as shown by the result of its operation in the State, and it has been of definite public benefit.

The Act is not in contravention of fundamental law, and certainly is not against public policy, and the presumptions are in favor of the validity of the Act. (119 Nebr. 153, supra.).

Appellant admits that the determination of the benefits of the Guaranty Fund Act presents an economic question. If the propriety of the Act must be resolved upon a discussion of business economics then, clearly, the Legislature has the right to maintain this Act, and the court should not take action to affect the operation of the law where its jurisdiction is invoked by reason of the appellant's economic argument against the wisdom of the special assessments complained of.

Engle vs. O'Malley, supra.
Noble State Bank vs. Haskell, supra.

Appellant insists as a requisite to the proper exercise of the police power, where the Legislature attempts by statute to take a portion of the property of the citizens for the public use, that the enactment must bear substantial relation to the original object and purpose, and that in this case it is shown that instead of accomplishing the purpose for which the Act was intended, it, in fact, defeats that purpose.

The expressed purpose of the Act was "a Guaranty Fund for the protection of depositors in banks."

Section 8024, Comp. St. Nebr., 1922.

The Legislature further provided that in case of the insolvency of a bank, the claims of the depositors should be paid immediately out of the cash on hand, and if that were not sufficient, the amount of depositors' claims in excess of cash on hand should be paid from the Guaranty Fund.

Section 8033, Rev. St. of Nebr., 1922.

We must concede that the purpose of the Legislature in passing this law was to provide a safeguard for the depositors in banks. This of itself might, it is true, be regarded as purely a private purpose, but we recognize that the Legislature had in mind a definite result to the public to be attained through the operation of the Act, and that was the stability of the banking system. This result we submit, as disclosed by the record, has been attained through an experience of seventeen years with the operation of the Act. The banking situation in the State of Nebraska has been definitely stabilized through the operation of the Act. Deposits in the State banks increased, and the serious results of business depression, which were in evidence in neighboring states, were prevented.

It may be admitted that the condition of many banks in the State of Nebraska is most unsatisfactory. However, that is not the fault of the State of Nebraska. This result has not been caused by the Guaranty Fund Act, but is due in part at least to the fault of the persons in charge of the institutions, which now complain, that because of their financial condition, they cannot pay the special assessment under the Act.

It does not appear consistent that these banks should be heard to complain and be permitted to use their own lack of success in business, to now defeat the Act when liability to depositors has accrued thereunder.

It may be conceded that depositors in solvent going banks have little need of protection. While it is possible that such a bank might be closed by unexpected withdrawals of current funds there will be little or no possibility of loss to the depositors in such cases. The depositors, who need protection, are those in banks which close by reason of the depositors money being unwisely loaned with resulting losses in assets, and these interveners are before the Court in the position of such depositors. They urge the return of their money through continuation of the special assessments for that purpose. The assessments complained of here clearly have a reasonable relation to the end expressed in the statute. They provide funds for the payment of depositors whose deposits were made at the time the banks and the people of the State were receiving the benefit of the Act.

The stability of the banks was assured until the commencement of this action on December 21, 1928. (Message—Gov. Adam McMullen, Rec. 434-437).

The depositors could have no knowledge of the general condition of the banks and in fact did have no such

knowledge until the startling allegations set forth in the banks' petition became public property when filed on said Dec. 21, 1928. If the knowledge did exist that the assessments could not or would not be paid, interveners most certainly would not have made nor maintained their deposits.

Appellant has devoted a portion of its brief to the proposition that the Guaranty Fund Act is in violation of the charter agreement between the State and the banks.

Under the constitution and laws of this State special charters to corporation, excepting charitable, educational, penal and reformatory, are prohibited and all banking corporations in the State of Nebraska are incorporated by general law which "may be altered from time to time or repealed." The amendment by the Constitutional Convention of 1920 made no change in this regard.

> Const. Neb. 1920, Art. XII, Sec. I.
> Const. Neb. 1875, Art. XIb, Sec. I.
> Lincoln Street Railway Company vs. City of Lincoln, 61 Neb. 109, Syl. III.

The passage of the Act was, therefore, within the power of the Legislature of Nebraska, as a proper exercise of its police power.

In so far as the assessments complained of are concerned, they were clearly within the right of the Legislature, and the banks called upon to pay these assessments should not be permitted to accomplish the purpose of this action when they had solely within their power the means to prevent, and theirs was the duty to foresee, the condition which is the basis for their contention of present unconstitutionality. The depositors in no manner contributed to that condition. Their deposits were made and maintained in reliance upon the protection the Act afforded them.

APPELLEES' CONTENTION NO. 4

THAT THE ACT PRESCRIBED A CONTRACT BETWEEN THE BANKS AND THE DEPOSITORS AND UNDER THIS CONTRACT RIGHTS OF THE INTERVENERS HAVE ACCRUED.

A contract is created when a depositor places money in the bank in the ordinary course of business. This contract while not express is implied in fact and under this implied contract the bank agrees and is obligated to repay the amount of the deposit to the depositor upon demand. On certificates of deposit the contract is express.

Citizens State Bank vs. Worden, 95 Neb. 53.

Under the Guaranty Fund Act when a deposit is made another contract is created. The terms of this contract are expressed in the law. Under this contract the banks which then accepted deposits agreed to and were obligated to make payment of certain assessments, based on their deposits, for the protection of depositors in any State bank which might be unable itself to fulfill its own contracts.

The case of Lankford vs. Platte Iron Works, 235 U. S. 461, has been cited and referred to in the brief of appellees, Weaver et al., in this case. The dissenting opinion of Justice Pitney is quoted at length therein at pp. 144-145 and in the said opinion is set forth a definite expression that the entire Court agrees,

> "that the act prescribed a contract, and one of wide importance between the banks and the depositors, and that the public interest is as much concerned in seeing it carried out and enforced according to its true intent and meaning as in requiring that the

contract be made. Not only has the state obliged the banks to make this contract with their depositors, but in the law it has expressed the terms in which it shall be made."

Unless the finding of the Court as to prescribed contract is entirely set aside, it is difficult to conceive a more direct placement of rights in the depositors and obligations upon the banks than is contained in the above quotation.

Conceding that the law does prescribe a contract the question arises,—What is the contract and what are the obligations imposed by it?

An investigation of the Act and the method of its operation can lead only to the conclusion that the contract prescribed is most definite and certain. Under it the banks are required as a condition precedent to the lawful conduct of their business to perform certain acts among which is to make a report of the amount of their deposits and they are required to pay a regular semi-annual assessment of 1/10 of 1% of the average deposits and such special assessments as may be levied by the designated board. The exact amount of this special assessment is not prescribed but the Legislature did fix a limit beyond which the body levying the assessment might not go (1/2 of 1% of the average deposits annually).

The purpose of both the regular and special assessments is definitely set forth in the Act. That purpose is the protection of the depositors in banks which might fail, so that funds may be available in the event of such failure to repay the depositors of that bank the full amount entrusted.

The State as such has no financial interest in the Fund created by the payment of the assessments.

This contract prescribed is collateral to the original contract between banks and the depositors for the repayment of the deposits in full.

The Supreme Court of the State of Nebraska has placed its interpretation upon this contractual relationship in many cases, among which is Rogers vs. National Surety Company, 116 Neb. 170, Nov. 10, 1927, page 178, wherein the court by unanimous opinion states:

> "In view of the statutory provision, the term 'Depositors' Guaranty Fund' is no misnomer and functions strictly as a 'guarantor' as the nature of its obligations is strictly secondary."

The Nebraska Court in the same case has construed this contractual relationship, as follows:

> ". . . . . whereas the Guaranty Fund is bound by a statutory, cumulative, collateral obligation by which it, in effect, is bound that the principal (the bank) is able to, and will, perform the contract and that if the principal defaults the Guaranty Fund, after statutory steps have been taken, must pay to the extent provided by law."

In view of the decision of this case it is clear that the appellant bank and all other going banks are guarantors of the obligations of the failed banks which were the principals to the original contract of deposit that exists in favor of the interveners and other depositors similarly situated. The terms of the contract of guarantyship which has been recognized by the Court in the case cited can not be abridged while obligations which accrued thereunder remain unpaid.

These interveners as depositors in failed banks are parties to the prescribed contract and have a pecuniary interest in the payment of the assessments by the banks, and they have the right to demand that the payment of these assessments be made to the Fund by the banks until all accrued liabilities are liquidated.

The courts of the State of Nebraska have in many other cases construed the Guaranty Fund Act and have recognized the existence of a contract between the banks and their depositors and under these holdings there has been developed a rule of property which has had recognition in this State for many years.

A notation of the number of the case and a brief reference to the matters determined in such cases is set out in appendix "A" which is attached to this brief.

A consideration of the entire Act (Neb. Sess. L. 1923 P. 438), clearly demonstrates the existence of such contract and makes clear the respective rights and obligations of the banks and the depositors.

The banks accepted and retained the deposits of the interveners which were made while the Act, which required payment of the special assessments, was in full force and effect. The banks for the purpose of increasing their deposits had held out to the public generally and to the appellees particularly the advantages of the Act, and the fact that their deposits were thus protected.

The rights of these interveners as depositors in failed banks accrued when their deposits were originally made and exist as long as they maintained their deposits in a State bank. They were entitled to believe that the assessments would be levied and promptly paid by the banks in accordance with law.

The rights of interveners became vested upon the adjudication of their claims, after the bank, in which the deposits were made, failed and when that bank refused or was unable to carry out its original contract.

Appellant in its brief denies the existence of contractual rights and obligations and cites the case of Wirtz vs. Nestos, 51 N. D. 603 and Standard Oil Company vs. Engel, 55 N. D. 163 to support its contention.

The case of Standard Oil Company vs. Engel merely held that the Commission created under a Bank Guaranty Act was the legal body in which was reposed the power to pass upon claims and mandamus to compel an allowance of such claims was denied because of that discretionary power.

In the Wirtz vs. Nestos case a depositor sought to compel the Guaranty Fund Commission to pay his claim first out of the money on hand and it was shown that the claim had not been approved as required by the Act. The rights of the depositor to compel action was denied. The case decides only that the discretionary power of the board as to manner of payment of claims could not be interfered with by a depositor. The case is not in point despite the dictum referred to in the brief of appellant although the Court stated that the claim of a depositor which had not been adjudicated did not create a vested right in the fund. It also held with reference to a depositor with a claim against the Guaranty Fund:

> "Whether approval of a claim as guaranteed by the State Examiner would have created a vested right which the Legislature could not have disturbed by subsequent Legislature is not decided."

Appellant insists that the intention of the Legislature was to provide protection for depositors in sound

going banks and that the first and foremost duty of solvent banks was to their present depositors. This we contend is immaterial to a determination of the issues here involved.

The rights of interveners in this case must be decided in accordance with the rules of contract. This is quite in accord with the agreement of this entire Court in reference to contractual rights under a Guaranty Fund Act as expressed in the dissenting opinion of Mr. Justice Pitney in the case of Lankford vs. Platte Iron Works, supra.

The Guaranty Fund created by the Act is the property of the banks themselves. The law requires that the Fund must be maintained by the payment of the assessments.

Unless the right to enforce payment of the assessment exists the prescribed contract will be a nullity.

Therefore it is inconsistent for appellant to contend that the banks have no contractual obligation to pay the assessments solely because these now have become burdensome.

If under the Act rights of depositors have accrued, corresponding obligations are imposed on the banks to maintain the Guaranty Fund to the extent made possible by payment of all assessments prescribed by the Act so long as accrued liability exists.

In this case it is the contention of appellees that even conceding for the purpose of argument that the constitutionality of the Act may properly be questioned, for the reason that it now serves no public purpose, the fact of the Act having been held constitutional and having been in force and effect for many years and rights

having accrued under it, will control the determination of this matter and that even if it is shown that the operation of the Act causes injury to the operating banks, courts will not permit the abrogation of the contractual rights accrued under it by those who had accepted the Act as constitutional.

The right of depositors to enforce their contract has foundation in equity by reason of the fact there is a definite moral obligation upon the parties bound.

The State upon its part has undertaken to levy the assessments under the Act and to enforce their payment into the Fund for the benefit of those entitled to collect from the Fund. This undertaking had created a moral obligation upon the State.

The case of United States vs. Realty Company 163 U. S. 427 recognizes the force and effect of this moral obligation.

In that case persons entitled to collect bounty for manufacturing sugar, under a statute held unconstitutional, were permitted to establish their right to the collection of such bounty in spite of the unconstitutionality of the statute under which the bounty was payable. In answer to the objection that no equities could be recognized which must necessarily be created under the constitutional statute, this Court said,

> "Under such circumstances can it be said the plaintiffs in these suits, and persons situated like them, were bound to know this law was and would be pronounced unconstitutional and that no right could be acquired under it? * * * * * We are of the opinion that these parties situated as were the plaintiffs in these actions acquired claims upon the government of an equitable, moral or honorary nature."

The court recognized that such a claim was binding and enforceable.

The situation in the instant case in the opinion of appellees discloses additional equities in favor of interveners which were not present in the Sugar Bounty case.

In this case the statute has been held constitutional by the Supreme Court of the United States. That fact was admitted by the bankers and was held out as an inducement to all depositors to place their money in State banks. The advantages of the law and its direct public benefit were proclaimed by the bankers and they declared that the Act had stabilized the business of banking in Nebraska.

The interveners believed that the Act was constitutional and made their deposits in that belief, and no knowledge had come to the interveners of the purpose of the banks to question the validity of the Act until the commencement of this action.

The contract prescribed by the Act has matured in so far as interveners are concerned. The measure of liabilities of the going banks to interveners on account of the operation of the Act has been determined. The bankers now admit knowledge of the extent of their liabilities under the Act but deny the right to enforce it.

So appellees contend that the result of the present or future operation of the law, in so far as it affects present or future depositors, should not be considered by the Court, nor should the Court in light of accrued rights of interveners, under all the facts shown in the evidence, consider the relation of the Act to present public welfare, as controlling.

The Court might, however, properly consider the discharge of the moral obligation of the State as having a direct and substantial relation to the public welfare.

The rights of interveners and depositors in failed banks which have accrued under the Act are paramount and superior to the right of the other parties to the prescribed contract to question the constitutionality of the Act.

One who attempts to relieve himself of the burden of his contract by urging that the Act does not serve a public purpose, receives no support for his contention merely by reason of the fact that conditions have arisen which make the carrying out of his contract burdensome. Particularly is this true where rights have accrued under the contract made.

It has been held where the rates of a street car company were found to be confiscatory in that they failed to return proper compensation for the service rendered, that the company was bound to adhere to the rates, because of the existence of a special specific contract limiting the maximum rate.

Georgia Power Co. vs. City of Decatur, 281 U. S. 505.

Clearly it would seem that the claim of appellees for the enforcement of their rights accrued under the prescribed contract is supported by the equities in the case and if further consideration is needed to strengthen the position of interveners the moral obligation of the banks under the record in this case supplies this consideration.

Interveners have a substantial financial interest in this case and they submit that the rights of the depositors in failed banks and the obligations of the banks of the State of Nebraska under the prescribed contract and upon equitable and moral considerations should be recognized and defined by the Court. Appellees respectfully submit if the Court shall find that there is a contract between interveners and the banks and that interveners have accrued rights under this contract, although it may be decided by reason of present conditions that the Act has no substantial relation to the public welfare, nevertheless the accrued rights of interveners should be recognized from the record in this case and the enforcement of these rights made possible.

From all facts and circumstances in this case, it would seem impossible to deduce reasoning which would permit the banks to put themselves beyond the law and avoid the obligations of their contracts, merely because they now contend that the payment of these obligations has become burdensome to them. Nor is it possible under all the facts and circumstances shown in the record to evolve a logical theory under which the rights of interveners as depositors in the failed banks can be destroyed.

APPELLEES' CONTENTION NO. 5

THAT THE BANKS HAVE FAILED TO SUSTAIN THEIR CONTENTION THAT THE SPECIAL ASSESSMENT PROVIDED IN THE ACT, AS A MATTER OF FACT, IS CONFISCATORY, OR THAT IT DEPRIVES THEM OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

It is asserted by the appellant in this case that the special assessment provided for in the Guaranty Fund Act is confiscatory and that it does not bear a substantial relation to the public interest and that therefore the

Act, so far as the special assessment is concerned, violates the Fourteenth Amendment of the Constitution of the United States.

The burden of proof is upon the one who attacks the enactment of a legislature upon the grounds of unconstitutionality to show that the Act would necessarily deny him just compensation and deprive him of his property without due process of law.

Groesbeck vs. Duluth S. S. & R. Co., 250 U. S. 607.
Knott vs. C. B. & Q. Ry. Co. 230 U. S. 474.
Simpson vs. Shepherd, 230 U. S. 352.
Aetna Ins. Co. vs. Hyde, 275 U. S. 440.

Appellees contend that, even if the rule of proof were narrowed to the limits of the rule which is applied in utility rate cases, an examination of the evidence in this case will most conclusively demonstrate the complete failure of proof on the part of the appellant.

The evidence produced upon the trial of the case, in so far as it applies to this contention, consisted, for the most part, of oral testimony of the employees of the department in charge of banking and certain tabulations prepared by auditors employed by appellant. There were certain conclusions shown by oral testimony to have been derived from these tabulations. The tabulations were prepared by grouping various banks, selected arbitrarily in light of earnings, or lack of earnings, in order to demonstrate that a number of banks were unable to earn dividends and were being operated at a loss. Other tabulations in reference to the condition of the banks were restricted to certain banks of the State selected by the auditor preparing them to serve some arbitrary purpose and it is evident that these tabulations were prepared in an attempt to support the

contention of appellant rather than to show facts with regard to the condition and manner of operation of each of the banks of the State and the effect of the assessments upon it.

The oral testimony, with the exception of the evidence given by the officers of three large and successful banks and the cashier of appellant bank consisted to a large extent of guesses and speculations as to the condition of the banks and the Guaranty Fund, and the opinions of witnesses as to the economic failure of the Guaranty Fund.

From the maze of evidence in the case the following facts may be deduced even if not regarded as proven.

Many of the seven hundred thirty eight banks in the State are in a most unsatisfactory condition. A great quantity of worthless assets has been accumulated in the banks. These worthless assets will represent great losses to the banks and they originated during the period of inflation and speculation which accrued after the war. "Charge offs" will reduce the assets of the banks and will prevent them from earning satisfactory dividends for sometime. A number of the banks are earning satisfactory dividends and others are showing excessive earnings. All banks made money from 1910 to 1920, and most banks paid dividends until a short time before the trial. The condition of the banks is much better now than it was in 1923. The assessments under the Act have not of themselves caused any injury to the banks. Properly operated banks with adequate capital can pay the assessments and earn dividends. Incompetency, speculation, bad banking practices, and betrayal of trust were contributing factors in the failure of many of the banks in the past, and there is evidence of incompetency and bad banking practices in many of the going banks.

The Guaranty Fund Act stabilized the banking business of the State, caused a substantial increase in deposits, prevented runs on banks and protected the State from the banking disasters which had occurred in neighboring States.

All of the foregoing evidence was general. There was no reference to banks in particular classes selected in the proper light of their location, capital and potential possibilities.

As to particular banks the evidence is limited to four. As to these it is shown that three large banks of the State are operated at a profit and can pay the assessments. Appellant bank is shown to be located in a small town where there was strong competition and where they had earned large dividends in the past but no dividends had been paid for two years. This bank was showing no substantial profit from present operations. It has accumulated among its assets "bad paper" which could not be charged off because the earnings were not sufficient to balance the expense of operation.

There is no evidence in the record as to the effect of the assessment on any particular bank which was operated in accordance with good banking practices and which was provided with adequate capital and which was located where it would have a potential possibility of success. The record is silent as to the correct relation of expense to income in any phase of bank operation in the State.

There is no evidence that any bank in the State was operated in accordance with good banking practice.

Nevertheless appellant rests his case upon these facts, and under the rules laid down in the rate cases cited this evidence is insufficient to meet the requirement of the rule of proof.

Appellant submits that the burden is on the one seeking the relief in a case of this kind to bring forward and satisfactorily prove the invalidating facts.

Aetna Ins. Co. vs. Hyde 275 U. S. 440.
Groesbeck vs. Duluth S. S. & R. Co., 250 U. S. 607.
Knott vs. C. B. & Q. Ry. Co., 230 U. S. 474.

However it is not conceded by appellees that the propriety of the Act which is challenged in this case is subject to the same rule which applies in rate cases.

The assessments under the Act in this case are made in the exercise of the police power of the State, and unless the exercise of this power is arbitrary and unreasonable and is not designed to accomplish a legitimate public purpose, it will be held valid.

Mutual Loan Company vs. Martell 222 U. S. 225.

The discretion of the Legislature is very large both in determining what the interests of the public require and what measures and means are reasonably necessary for the protection of such interests.

Manigault vs. Springs 199 U. S. 473.
Lawton vs. Steele 152 U. S. 133.
Powell vs. Pennsylvania 127 U. S. 678.
Gitlow vs. New York 268 U. S. 652.

The mere conflict of opinion does not bring within the range of judicial cognizance a statute enacted under the police power.

Erie Ry. Co. vs. Williams 233 U. S. 685.

Appellees submit, even if proof in this case is given its most liberal interpretation and if it then is tested by the most liberal rule the record clearly discloses

complete failure on part of appellant to prove the facts necessary to sustain its case.

A case recently decided by this Court sets forth an exposition of the ruling of this Court as to the requirements of pleading and proof in a case of this sort.

Aetna Life Ins. Co. vs. Hyde 275 U. S. 440.

In this case a Missouri Statute permitted the Insurance Commissioner, for the purpose of fixing rates, to group the aggregate profit of companies to determine an adequate rate and to fix a proper rate. Certain Insurance Companies objected to the rate thus fixed and claimed that it was confiscatory and repugnant to the due process clause of the Fourteenth Amendment. In the opinion the Court said:

> "No company receiving just compensation is entitled to have higher rates merely because of the plight of its less fortunate competitors. Companies whose constitutional rights are not infringed may not better their position by urging the cause of others. (Citing Supervisors vs. Stanley, 105 U. S. 305; Heald vs. D. of C., 250 U. S. 20 114). As a practical matter of business, it is impossible in the long run for some companies to collect higher premiums than those charged by others in the same territory. Rates sufficient to yield adequate returns to some may be confiscatory when applied to the business of others. But the latter have no constitutional rights to prevent their enforcement against the former. The Fourteenth Amendment does not protect against competition. Moreover, aggregate collections sufficient to yield a reasonable profit for all do not necessarily give to each just compensation for the contracts on insurance written by it. It has never been and cannot reasonably be held that the State made rates violate the 14th Amendment, merely because the aggregate collec-

tions are not sufficient to yield a reasonable profit or just compensation to all companies that happen to be engaged in the affected business, * * * * * "

Further the Court held:

"and the complaint fails to show that the business in Missouri of each is so well and economically organized and carried on that petitioners are entitled, as of right protected by the Constitution, to have premiums amounting in the aggregate enough to yield a reasonable return or profit to all the companies."

Another case decided by this Court affirming decision of the District Court of the United States for the District of Nebraska is in point.

Tagg Brothers & Moorhead vs. United States
280 U. S. 420 Affirming.

Tagg Brothers & Moorhead vs. United States
29 Fed. (2nd) 750.

Another recently decided case illustrates the rule.

Beaumont, S. L. & W. Ry. Co. vs. United States
(November 24th., 1930) 31 Sup. Ct. Rep. 1.

The original petition filed in the case at bar listed 559 banks as plaintiffs and admitted that 180 of the State banks did not join in the action. The appeal in this case is taken only by the Abie State bank.

Appellees respectfully submit to the Court that in this case because the appeal has been taken only by the Abie State Bank and in its own behalf it is proper now to view the record in this case in light of that fact

An examination of the evidence introduced on behalf of the Abie State Bank will certainly not bring it within the rule laid down in the cases cited. The evidence shows, beyond doubt, the bank by reason of its location, competition, amount of its business, its potential and actual income and its fixed expense of doing business cannot profitably operate. It is not shown that other banks of this class are being operated in the same manner, or that they are subject to the same expense of operation. The record negatives the fact of economical and proper operation of the bank. Clearly appellant has not complied with the established rule as to proof in this sort of case.

In view of the record in the case, it is apparent the Abie State Bank has failed to sustain on its own behalf the burden of proof imposed upon it by law so far as its individual condition and operation are concerned, and it has produced no definite and detailed evidence as to any other banks similarly situated which have been affected by the imposition of the Guaranty Fund assessments to the extent that the payment of the assessments amounts to confiscation of their property.

The statement of Mr. Justice Hughes in the decision of Knott vs. C. B. & Q. Ry. Co., 230 U. S. 474, sets forth the controlling rule in this case:

> "Each complainant, in order to succeed in assailing them (rates) must show that as to it the rates are confiscatory."

Two cases recently decided by this Court restate the rule of proof.

Toombs vs. Citizens Bank, 281 U. S. 623.

Corporation Commission of Oklahoma vs. Lowe, 281 U. S. 431.

It is interesting to note there is nothing in the record from which this Court can determine which of the banks of the State are properly managed unless the payment of dividends will be regarded as evidence of proper management, nor is there anything in the record from which the Court may determine as to the banks which have not paid dividends recently, which are properly and efficiently managed and which are not, and the Court can not determine from the record whether the various expense items of the bank were reasonable, proper or otherwise. It is not shown which of the banks in bad condition have been making excessive or unwarranted loans, and which were conducting their business in a proper manner. The record does not disclose which of the banks with impaired capital are managed by competent and honest men, or which have suffered losses by reason of incompetency or dishonesty.

Appellant certainly can not seriously contend the mere fact of the existence, among the assets of the banks of the State of a large amount of questionable assets, acquired by the banks themselves in the ordinary course of their business, supports the theory that the assessments under the Guaranty Fund Act are confiscatory.

Appellees submit there is no evidence in this case to sustain the contention of appellant that the special assessments under the Act are oppressive and and arbitrary.

The only evidence as to the effect of the assessment on the various banks as shown in the record has been commented on by appellees heretofore and further reference will not be made.

The general rule is that the Legislature is the judge as to what laws should be enacted for the protection and welfare of the people.

Mugler vs. Kansas 123 U. S. 623.
House vs. Mayes 219 U. S. 270.

The discretion of the Legislature is large both in determining what the interest of the public require and what means are reasonably necessary for the protection of the public.

Green vs. Frazier 253 U. S. 233.

Appellees contend that upon appellant rest the burden of proof to conclusively prove that the Act does not bear a substantial relation to the public good.

Until such fact is proven beyond reasonable controversy the courts will not interfere with the enactment of the Legislature.

Green vs. Frazier 253 U. S. 233.

The statute is shown to have been effectual for many years for the purpose originally intended and appellant attempts to show that the statute has no present relation to the public welfare by reason of the existence of the deficit in the Fund.

The public is as vitally concerned in the payment of the accrued liabilities because of its effect upon business and the public generally as it is concerned in any right of depositors in solvent banking institutions.

The test as to whether a statute bears substantial relation to public welfare must be made in light of the circumstances surrounding each particular case and in determining this relation of a statute the court must take into consideration all of the facts disclosed by the evidence and the effect of the operation of the Act both as to benefits conferred and obligations imposed and

should seek to determine whether or not rights have accrued under the statute which should under principles of equity and right be protected by the court.

By the enactment and continuation of the statute, the State has imposed upon itself a moral obligation to protect the depositors whose rights have accrued under the operation of the Act.

The public interest may perhaps be as well served by the discharge of the moral obligation owing by the State as by direct and substantial benefits which might be derived by the public from the operation of the Act.

Therefore appellees submit that in view of all of the facts and circumstances in this case the intangible benefit to the public does supply the basis of authority for a continuation of the Act until the rights of interveners have been settled and the obligations to interveners discharged.

This intangible benefit of preservation of the integrity of the State may be quite as sufficient reason for the continuation of the Act as would be a definite substantial or financial benefit.

In view of the record it is submitted that, as to the burden of proof on the question whether or not the special assessments attacked are oppressive and arbitrary and bear no relation to the public welfare, appellant has failed to sustain the burden of proof imposed upon it by the law.

Recognizing the logical requirement that the determination of the case should be made upon all of the facts and circumstances shown in the evidence, if the conclusion to be deduced from the evidence may be tested by the balancing of equities, as it is clear that it properly may be, it will be seen that the equities are with the de-

positors and the banks have placed themselves out of position to invoke the principle that the assessments bear no present relation to public welfare to assist them in sustaining their burden of proof, and enable them to escape the performance of their contract.

It is respectfully submitted that if the evidence in this case is examined in light of the decisions in the cases heretofore cited that the failure of proof on the part of appellant to establish the essential facts which are required to sustain the issue of unconstitutionality is so evident that the case of appellant can not by any hypothesis be sustained.

APPELLEES' CONTENTION NO. 6

THE BANKS HAVE WAIVED THEIR RIGHTS TO QUESTION THE CONSTITUTIONALITY OF THE ACT BY ACCEPTING BENEFITS THEREUNDER OVER A LONG PERIOD OF YEARS, AND SHOULD BE ESTOPPED FROM CONTESTING THE COLLECTION OF THE SPECIAL ASSESSMENT ENACTED TO PAY NET LIABILITIES TO DEPOSITORS ACCRUING UNDER THE ACT.

There are three elements entering into the consideration of this contention:

1. The activities of the banks in sponsoring and procuring the enactment of legislation, which amended the original terms of the Act and affected its operation.

2. The acquiescence by the banks over a long period of years while rights of others were accruing thereunder and the acceptance of those benefits which the Act conferred upon the banks.

3. The overt acts of the banks, under a permissive section of the Statute, in asserting the complete protection afforded depositors in banks which might fail, by means of pamphlets, newspaper articles, signs and and the wording upon all evidence of indebtedness issued by banks to depositors, and the direct representation to interveners and their reliance thereon.

Under the first heading appellees will briefly point out the amendments to the original Act by the Legislature of 1923 (Neb. Sess. Laws 1923, Chap. 191, pp. 438-463). The reduction in the assessment and the transferring from the Department of Trade and Commerce to the Guaranty Fund Commission of important administrative duties, and the provision by which the Commission must be made up exclusively of bankers duly elected by themselves, are important. These enactments were fostered by the State banking fraternity, (Supp. Rec. pp 52-55).

In substance the Act of 1923, supra, made provision: for dividing the State into banking groups; for a duly called election, each bank being entitled to one vote for members for the Commission; for the compulsory appointment by the Governor of the Guaranty Fund Commission made up solely from these representatives; for the complete power of the Commission to engage and discharge all employees and make all rules and regulations necessary for the conduct of its business; to compel the Department of Trade and Commerce to immediately lay before the Guaranty Fund Commission all examiner's reports on all banks delinquent in operation and for operation of any bank by the Guaranty Fund Commission unless its mandate was complied with within sixty days; for an administrative fund to be paid by the banks and providing compensation to the Commissioners; for definition of impaired capital and plenary powers to the Commission over banks reported operating in a manner dangerous to depositors; for pos-

session of assets and the release of any mesne or final process theretofore made; for notice of possession to forestall all liens; for inventory of assets and liabilities of any bank taken over; for management of any failing bank by the Guaranty Fund Commission without regard to its solvency, and the acceptance and maintenance of deposits; for the compulsory assignment of all stock in such banking corporation to the Guaranty Fund Commission, if in their judgment its officers, directors and stockholders are incompetent; for procedure for liquidation; for the appointment of a receiver to be named by the Commission; for penalties for failure to carry out orders of the Commission; for the filing of claims and hearings thereon, and giving depositors priority over all other creditors except taxes; for transferring of all assets to Guaranty Fund Commission; for the issuance of a certificate to banks upon compliance with the terms of the Act; for the Bankers Conservation Fund for the purpose of preventing the closing of banks and permitting an assessment on one-third of one per cent upon all average daily deposits, this fund to belong exclusively to the banks and used to loan money to the Guaranty Fund; Section 8028 is the section provided for a special assessment upon depletion of the Depositors Guaranty Fund and authority to levy up to one per cent of the average daily deposits for the year 1923, but thereafter the levy could not be made to exceed one-half of one per cent in any one year; for the advancement of money by the Bankers Conservation Fund to any bank in the process of liquidation for the purpose of placing it upon sound basis upon the repayment of the sums so advanced with interest; for the sale of any bank and the issuance of stock by the Commission from the stock book to the purchaser; for the sale of the assets of any liquidating bank directly to the Guaranty Fund Commission and the administration of this trust by the purchaser itself; (Sec. 32 Neb. Sess. Laws

1923 and Neb. Sess. Laws 1925, chap. 30, p. 125); for complete report annually by the Commission to each State bank showing earnings, losses, profits, surplus, depreciation in assets, dividends paid, and all other informative data, on all banks under supervision; for penalty for inducing deposits by gift or compensation that would increase the statutory rate of interest on time certificates, which previously was five per-cent and then reduced to four; for the issuance of receiver's certificates and the payment thereof with interest from the Depositors Guaranty Fund.

The Act repealed sections 7987, 7989, 8013, 8028, 8029, 8032, 8033, and 8036 Comp. St. of Neb. 1922, declared an emergency, and became effective April 17, 1923, without executive signature.

It will be seen from a study of this Act of 1923 that its purpose was to give complete power to the bankers over any bank which appeared to be operating its business in such manner that it might become a charge upon the Depositors Guaranty Fund. It gave the Commission complete plenary power to do almost anything that it desired for the protection of such banks including its complete operation, the taking over of its management to the exclusion of its officers, directors and stockholders if conditions warranted, and gave the Guaranty Fund Commission access to the "inside" of all banks which were not complying with the law, and provided that any examiner who failed to report any non-compliance by any bank would be deemed guilty of a felony.

Thus it would seem the Act provided to each State Bank every possible means of information regarding improperly operated banks. By the method of election the banks themselves through their representatives became the sole members of the Guaranty Fund Commission. It gave the State banks of Nebraska complete supervision and control of the situation from April 17,

1923 until after the filing of this action by the banks on December 21, 1928. During that period of time interveners rights accrued.

We call particular attention to the Bankers' Conservation Fund in relation to the part it played in the acceptance and acquiescence of the banks in the terms of the Act. Prior to the enactment of 1923 during 1921 and 1922, $2,500,000.00 was loaned to the Guaranty Fund by the banks and repaid with interest. (Rec. p. 642, Qs. 4189-90). In 1923 and 1924 $2,305,776.93 was advanced to the Guaranty Fund by the banks and repaid with interest. (Rec. p. 665, Qs. 4256-7; Rec. p. 300, Qs. 1618, 1620, 1621, 1627, 1628, and 1629).

It may be noted that the only period in which the full special assessment was levied was during the years 1925, 1926, and 1927, though the special assessment was in force for eighteen years.

These appellees, therefore, conclude that if cash had not been loaned to the Guaranty Fund in order to keep the fund apparently solvent by ostensibly having on hand at all times for eighteen years one per cent of the average daily deposits of all banks, as a reserve, the full assessment would necessarily have been levied. If the full assessment had been levied from 1919 to 1924 instead of borrowing money from the bankers, the deficit in the Guaranty Fund at this time would have been decreased by $2,215,000.00. The banks, we contend, escaped responsibility by their sponsoring this legislation and their activities thereunder. This is a matter of simple arithmetic. (See Exh. 44, Rec. pp 487 and 488; Rec. p. 655, Qs. 4258 and 4259).

The very terms of the amendment as sponsored and procured and acted upon by the banks gave them unlimited authority, and this becomes very material because the record discloses that at the time of the trial

this Guaranty Fund Commission, created at the instance of the bankers in order to give them complete domination, had on hand thirty-nine millions of dollars of assets drawing interest in favor of the Fund. As against this, the record shows approximately twenty-five millions of dollars of unpaid claims of depositors. This status arose almost entirely and these accumulations took place during the operation of the law enacted in 1923. The thirty-nine millions of dollars represents for the most part the cash of depositors entrusted to banks. After it passed the receiving teller's window, the deposit became the property of the bank. The depositor had no further control over it. The bank invested the funds and the investment, whatever it was, became the property of that bank. Upon its failure, because of the unwise investment, these assets became a part of the Guaranty Fund. The representative of the Guaranty Fund Commission, Secretary Peterson, stated that in his estimation these thirty-nine millions of dollars of assets were worth possibly ten millions of dollars. Thus did the depositors' money dwindle after it passed through the receiving teller's window. The management, the control, the sales, the collections, the manipulation and the complete handling of thirty-nine millions of dollars was from 1923 in the hands of the banks through their exclusive representation on the Commission, until the law was changed after this action was started. However, every intervener's deposit was made and his claim matured between April 17, 1923 and Dec. 21, 1928.

Appellees contend that the representation given to the banks by the liberal terms of the 1923 amendment effectually estops the banks today to question the propriety of the levy of the special assessment, and the continuation of the levy of that special assessment until all of the money that passed through the "cage" in the first instance has been repaid to the interveners respectively entitled thereto, in accordance with their adjudicated claims.

Section 7995 Neb. Sess. Laws 1925 re-enacted the previous existing provision for the issuance of a certificate to all banks in the State which had complied with the terms of the Guaranty Fund Act, and these banks by the acceptance of the certificate showing that they had complied with the Act by the payment of their assessments, would be permitted to advertise that their depositors were protected by the Guaranty Fund. This certificate was annually issued to each and every bank in the State during all of the time that the interveners rights were accruing. It could only be issued by a showing that the bank was complying with the Act. The Act gave to the banks ample opportunity for information and knowledge of conditions, and if the officials of banks under such circumstances failed to realize the growing amount of the unpaid deposits and the increasing shrinkage of the assets, the depositors are not to blame. There exists under such condition no valid excuse to escape the continuation of the special assessment until the difference between the face of the deposits and the present value of the assets in the Guaranty Fund is completely eliminated by the continuation of the special assessment.

The banks have thus waived their right by these renewed activities under the Act, from 1923 to 1928, to question the special assessment. The participation by the banks in the procurement of the legislation, which they desired, and their continued activities thereunder effectually substantiate the interveners' defense of waiver and estoppel.

Pierce Oil Co. vs. Phoenix Ref. Co., 259 U. S. 125.
Pierce vs. Somerset Ry. Co., 171 U.S. 641.
Wall vs. Parrott Silver & C. Co., 244 U. S. 407.
Grand Rapids & I. R. Co. vs. Osborne, 193 U. S. 17.
Shepard vs. Barron, 194 U. S. 553.
Daniels vs. Tearney, 142 U. S. 415.

The foregoing cases are illustrative of the applications by the courts of the rule under which one, who had participated in an effort to procure legislation and had secured control of operation under it and who had acquiesced for a long period of time in the enactment by acceptance of benefits thereunder, is estopped to claim that the Act is unconstitutional, because he has waived the right to assert such claim.

The presumption is that for five years each bank in the State of Nebraska voted to maintain the Guaranty Fund Commission by the election of its choice of representative. It was chargeable with knowledge of the law and the power and control vested in that commission thus elected.

In Shepard vs. Barron, supra, the court said:

> "Under some circumstances a party who is illegally assessed may be held to have waived all rights to a remedy by a course of conduct which renders it unjust and inequitable to others that he should be allowed to complain of the illegality. Such a case would exist if one should ask for and encourage the levy of the tax of which he subsequently complains."

In Grand Rapids I. R. Co. vs. Osborne, supra, the court said:

> "Having voluntarily accepted the privileges and benefits of the incorporation law of Michigan the company was bound by the provisions of existing laws regulating rates of fares upon railroads, and it is estopped from repudiating the burdens attached by the statute to the privilege of becoming an incorporated body."

In Wall vs. Parrot Silver & C. Co., supra, the court states:

> "They cannot claim the benefits of statutes and afterwards assail their validity. There is no sanctity in such a claim of constitutional right as prevents its being waived as any other claim of right may be."

In Pierce vs. Somerset R. Co., supra, the syllabus reads:

> "A person may by his acts or omission to act, waive a right which he might otherwise have under the Constitution of the United States."

In Pierce Oil Co. vs. Phoenix Ref. Co., supra, the court states:

> "There is nothing in the nature of such a constitutional right as is here asserted to prevent its being waived, or the right to claim it barred, as other rights may be, by deliberate election or by conduct inconsistent with the assertion of such a right."

And the syllabus reads under the heading that the right to due process of law may be waived:

> "The constitutional right not to be deprived of property without due process of law can be barred, as other rights may be, by deliberate election or by conduct inconsistent with the exercise of such a right."

In Daniels vs. Tearney, supra, the court said:

> "It is well settled as a general proposition, subject to certain exceptions not necessary to be here noted, that where a party has availed himself for

> his benefit of an unconstitutional law, he cannot, in subsequent litigation with others not in that position, aver its unconstitutionality as a defense, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit. In such cases the principle of estoppel applies with full force and conclusive effect,"

and further on the court quotes from cited cases, in the following language:

> "Upon what principle of exalted equity shall a man be permitted to receive a valuable consideration through a statute, procured by his own consent or subsequently sanctioned by him, or from which he derived an interest and consideration, and then keep the consideration, and repudiate the statute?"

The benefits to the banks were generally, three fold: the increase of deposits estimated at one hundred million dollars; the prevention of "runs on banks," and the consequent resulting stabilization of their business.

Appellees have mentioned a third element of waiver and estoppel which is the overt acts of the banks under a permissive section of the statute, in asserting the complete protection which the Act afforded to depositors in banks that might fail, by pamphlets, newspaper articles, signs and the wording upon the evidence of indebtedness issued by banks to depositors, and the direct representation to interveners and their reliance thereon. The banks took advantage of this permissive statute allowing them to advertise the fact that the deposits in their banks were protected by the Depositors Guaranty Fund. This the banks effectually did in 1926, 1927 and 1928 after they had information about the growing deficit in the Guaranty Fund and the imminent danger of loss to depositors. These facts were kept from depos-

itors. These advertisements ran during the time that interveners' deposits were being made and maintained. Some of said advertisements are set forth in the record (pp. 238 and 239). These are also commented upon and set forth in the brief of appellees, Weaver et al., pp. 28-54 and 164-183.

The compelling statement in all of these advertisements is the admission that there is a contractual relationship, which the banks, over their own signature assert does exist between every depositor and all of the banks; and this contract of mutual protection was by said advertisements proclaimed as the protection that every depositor in every State bank had in the event of failure; that runs upon banks were unknown in Nebraska, and that no depositor in all of the failures that had previously taken place, had ever lost a dollar; that deposits should be made and maintained irrespective of bank solvency. Thus were the contractual rights acknowledged.

In fact, all depositors were paid in full up to November of 1927.

These overt acts had their effect upon the interveners. The signs were displayed on all the banks. This under the statute of course was permissable, not compulsory. Millions of dollars were paid and being paid to depositors in failed banks. The interveners saw these activities and relied upon the integrity of the banks to continue to fulfill the promises made in the published statements which were in no way in conflict with the statute.

The reliance on all these proclamations and upon the Act by the interveners is conclusively proven by the making of their deposits, maintaining them and their resort to the Guaranty Fund for payment.

The publicity given to the petition as filed by the banks in this case on December 21, 1928, was the first sound of warning to reach the ears of these interveners. On that date each and every one of their deposits was in the hand of either the Guaranty Fund Commission or banks being operated under receivership, and they were helpless to make any move to protect their rights, except to file a petition of intervention in the case and call upon the judicial branch of the Government to aid them in the enforcement of their rights. The Guaranty Fund, theretofore pictured as "Sound as the Rock of Gibraltar," was sworn to be defunct in the petition as filed.

There can be no more typical example of the application of the rule of waiver of the right to queston the enforcement of an assessment and the estoppel of the party charged to deny liability than above demonstrated.

ARGUMENT ON QUESTION OF WHETHER OR NOT THE ISSUE BEFORE THIS COURT IS MOOT

At this time interveners desire to direct the attention of the Court to the fact that the position of intervening depositors in this case must be clearly distinguished from that taken by appellees, Weaver et al., as shown by their Propositions of Law 20 and 21. (Brief pp. 214-217).

Therein it is contended that the Legislature passed a valid Act at an "Extraordinary Session" convened on March 4, 1930, and adjourned March 15, 1930; that at this special session "the Guaranty Fund Law was modified." The fact is the Guaranty Fund Law was not modified, but an attempt was made to repeal in toto the entire Act, including Section 8028. That section provides for the special assessment of five-tenths of one per cent,

which we have shown to have been in full force and effect at all times when intervening depositors' rights accrued. What the Legislature attempted, was to create a "Depositors' Final Settlement Fund," in an endeavor to relieve the banks of the major portion of their responsibility to intervening depositors with accrued claims. On the pages referred to in appellee Weaver's brief, they insist that by reason of this enactment of 1930, the questions before the Court are moot and assume in their brief that the Act of this "Extraordinary Session" has relieved the banks and that their claim of confiscation must now fall.

It may be that the appellees, Weaver et al., look upon the important issues herein as moot and in instances some banks may regard this case as moot, but the rights of these intervening depositors should not be measured in this action by the admission or contentions of appellees, Weaver et al., nor by what was attempted at this "Extraordinary Session" of 1930. These interveners, as a matter of law must be permitted to question the propriety and the legality of the Settlement Fund, should they so elect, in a proper proceeding instituted in a proper court. These interveners submit that such Act has no place in the consideration of the issues raised by interveners in this case, because (a) interveners' rights are contractual; (b) the contract has become executed; (c) the amount due has been adjudicated and judgments rendered; (d) there can be no enforcement of the judgment nor satisfaction thereof except by the continuation of the special assessment by the banks into the Guaranty Fund in the amount and in the manner provided by the laws in force from 1923 to 1928, inclusive, during which time interveners' deposits were made and maintained and when the banks failed or were taken over by the Guaranty Fund Commission.

It is the statutes in force and effect during that

period which must of necessity be construed by the Court in this action.

Appellees, Weaver et al., cite four cases to sustain their contention that the question is moot. Without discussing each of the four cases cited, we contend that they are not in point, because there were no accrued rights as a matter of law to be respected, and the rights of the respective parties had been concluded prior to the submission on appeal. Consequently the questions were moot.

Interveners call the Court's attention to City of Boston vs. Jackson, 260 U. S. 309, wherein it is said that the question therein was not a moot one:

> "But the tax had been paid before the Supreme Judicial Court took up, considered and decided the case. It must therefore have found as it was entirely justified in doing that the bill in its averments, prayer and real object was directed not only against the collection of the tax then pending, but against future payments of the treasury of the commonwealth and against the continued operation by the trustees under the statute of 1918 with the possible incurring of future deficits to be assessed against the city for collection."

Groesbeck vs. Duluth, S. S. & R. Co., 250 U. S. 607.

The syllabus in this case reads as follows:

> "Appeal of defendants, in a railroad's suit to enjoin enforcement of a state rate-fixing statute as confiscatory, does not become moot by the repeal of the statute, where the railroad has been required to issue to intrastate passengers receipts agreeing to refund, if the statute should be held valid, the

excess fare paid; a large fund having accumulated pending litigation, and the refund coupons being outstanding."

It would seem to appellees that these cases are analagous. Obligations have been incurred. Depositors have unquestionably entered into innumerable transactions based upon their money being safeguarded in the manner provided by law. Business of a bank went on whether the Guaranty Fund Commission was in charge or not. The right to operate the bank, whether solvent or insolvent, was one of the features of the 1923 statute, which continued in force until after this litigation was started. It cannot be said that the appeal before this Court is moot when interveners are before the Court representing approximately twenty-five millions of dollars of adjudicated and unpaid claims arising under the 1923 enactment and the banks liable for these claims seek to enjoin the collection of the assessment provided for the means of payment. Nor is it moot because the Legislature elected at a special session to repeal the Act and substitute something else in its place which does not provide for the entire fulfillment of the obligations that arose under the previous laws.

Even though the Act is unconstitutional or non-enforcible as to all depositors' claims which accrued after December 21, 1928, the law as above set forth establishes intervening depositors' rights to have the 1923 special assessment continued against all the banks, until there is no further depletion in the Guaranty Fund as defined in Section 8028 Sess. Laws. Neb. 1923, page 452. The terms of that section provide the means for the payment into the Fund, which insures its solvency, and in turn the payment of the interveners' adjudicated claims. These are some of the substantial matters before this Court for determination and are not moot.

CONCLUSION

Interveners conclude that their plea of waiver and estoppel has been sustained and that appellant's contention of confiscation has not been established as a violation of the Fourteenth Amendment in light of interveners' accrued rights.

The contractual obligations prescribed by the law, accepted and acted upon by the appellant and all other State banks, became absolute during the period that intervening depositors were entrusting and maintaining their funds in State banks. At such time the interveners had no knowledge nor means of acquiring knowledge of the then condition of banks and the Guaranty Fund, whatever it was. The interveners relied upon the terms of the Act and its frequent adjudication by the courts. The banks were given the opportunity of control and precise information under the Act of 1923.

The record discloses that the equities are with the depositors, and that a moral obligation is imposed upon the State to compel the fulfillment by the banks of their part of the contract.

The banks have at no time offered to do equity by paying the accrued obligations and then be relieved. They assert no equities exist in favor of interveners.

The record discloses certain worthwhile benefits to the banks, acknowledged and accepted by them; and the fact that the anticipated benefits proclaimed by the banks were not realized affords no logical ground in law or equity that will permit them to evade their responsibility.

The substantial rights of interveners accrued under the 1923 Act, and the aggressive activities of the appel-

lant and other State banks were patent to the interveners and the public at large.

The contentions of appellant are two-fold; one of which is, that the Act should be for the benefit of the bank's own depositors and the depositors in other solvent banks, and the other that because the special assessment must now be used to pay the accrued claims of depositors in failed banks, it bears no relation to the public welfare and has thus become unreasonable. Neither contention recognizes the rights of intervening depositors, who placed their money in solvent banks relying upon the terms for payment prescribed by the Act.

In support of the two contentions of the appellant, the original decision of this Court is criticized in its present application, because appellant contends it was based upon the supposed operation of the law. Intervening depositors having implicit faith in the ability of the banks to fulfill their promises, and in reliance upon the Act, likewise relied upon the supposed operation of the law. Consequently, much of appellant's brief is immaterial to a decision of the questions properly before the Court in this case.

The case of interveners turns on accrued rights, and the questions to be decided by the Court are whether contractual rights of interveners in fact exist, and whether the banks waived their right and are estopped to interpose a defense to defeat such rights under the conditions disclosed. Waiver and estoppel are personal defenses which have been properly pleaded and established by these interveners on behalf of themselves and those similarly situated.

The existence of the contract under the Act of 1923 having been established, the present attack upon the constitutionality of the special assessments becomes im-

material to a decision of the case. It is because of these reasons the appeal should be dismissed.

Respectfully submitted,

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CLINTON J. CAMPBELL, Lincoln, Nebraska
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APPENDIX "A"

CASES DECIDED BY SUPREME COURT OF NEBRASKA CONSTRUING GUARANTY FUND ACT AND DEFINING RIGHTS AND LIABILITIES THEREUNDER.

State vs. Farmers and Merch. Bank, 93 Neb. 1 (1913); Galt vs. Hildreth, 100 Neb. 15 (1916); assessment provided by Act construed liability of Bank; State vs. Morehead, 100 Neb. 864 (1917), Banking Act construed as to rights to withhold new charter because of Guaranty Fund needing protection (See page 871); Central St. B. vs. Far. St. B., 101 Neb. 210 (1917), deposit is agreement and charge against fund; Farren vs. Far. St. B., 101 Neb. 285 (1917), defining a depositor, and benefits of Act; Iams vs. Far. St. B., 101 Neb. 778 (1917), no liability against Guaranty Fund where more than five per cent interest paid; State vs. Far. St. B., 103 Neb. 194 (1919), banks permitted to intervene because interested parties, in litigation involving Guaranty Fund between State and banks; State vs. Banking House, 110 Neb. 564 (1923), wherein deposit construed; State vs. Far. St. B., 111 Neb. 117 (1923), deposits construed in light of Guaranty Fund Act; State vs. Peoples State Bank, 111 Neb. 136 (1923), County Treasurer's deposit construed; State vs. Neb. St. B., 111 Neb. 360 (1923), Guaranty Fund Act construed as to interest; State vs. Am. St., B. 112 Neb. 182 (1924), deposit defined; State vs. Am. St. B., 112 Neb., 272 (1924), liberty bond deposit defined; State vs. Brown County Bank, 112 Neb. 367 (1924), distinction between liability of Fund and bank; State vs. Far. S. B., 112 Neb. 380 (1924), deposit construed not under Act; State vs. Far. S. B., 112 Neb. 474 (1924), deposit construed; Vavra vs. Claridge, 112 Neb. 553 (1924), equitable owner's rights; State vs. South Fork Bank, 112 Neb. 623 (1924), accepted check held deposit; State vs. Far. St. Bk., 112 Neb. 788 (1924),

private arrangements for interest more than five per cent takes deposit out of Guaranty Fund Law; State vs. Am. Ex. Bk., 112 Neb. 823 (1924), depositor takes choice of receiving five per cent and come under Guaranty Act, or more interest and be without its protection; State vs. Brown, 112 Neb. 642 (1924), trust funds under Guaranty Fund Law; State vs. Far. St. Bk., 112 Neb. 788 (1924), certificate bearing more than five per cent not protected; State vs. Wayne County, 112 Neb. 792 (1924), solicitation of deposits by bank does not make deposits loans; State vs. Am. Ex. Bk., 112 Neb. 834 (1924), deposit defined; State vs. Kilgore, 112 Neb. 856 (1924), subrogation to Fund; State vs. Far. St. Bk., 113 Neb. 82 (1925), purpose of statute construed; State vs. Holmes St. Bk., 113 Neb. 93 (1925), credit not subject to check not within Guaranty Law; State vs. Gross State Bank, 113 Neb. 119 (1925), only bona-fide deposits protected; Howell State Bank vs. Estate of Miller, 113 Neb. 117 (1925), bona-fide deposit defined; State vs. Fms. St. Bk., 113 Neb. 348 (1925), deposit under Guaranty Fund Law defined; State vs. Fms. St. Bk., 113 Neb. 497 (1925), enforcement of stockholders' double liability not supplanted by Guaranty Fund Act; State vs. Fms. St. Bk., 113 Neb. 679 (1925), method of computation of interest on claims against insolvent banks defined; State vs. Kilgore, 113 Neb. 772 (1925), The depositors' Guaranty Fund is not liable for the payment of a bank deposit unless both depositor and bank come within the provision of the Bank Guaranty Law; State vs. Atlas Bank, 113 Neb. 843 (1925), certain certificate of deposit held not protected by Guaranty Fund because of paid inducement which ran the interest on the certificate over five per cent; State vs. Far. St. Bk., 114 Neb. 168 (1926), deposit construed within protection of Act; State vs. Gering, 114 Neb. 213. (1926), even though excessive, deposit by County Treasurer protected; State vs. Gering, 114 Neb. 213 (1926), surety who pays liability to Treasurer entitled to preferred claim against Bank Guaranty Fund; State vs. Far. Bk., 114 Neb. 378 (1926), money de-

posited ceases to be money of the depositor and becomes the money of the bank; State vs. Newcastle, 114 Neb. 389 (1926), soliciting and receiving funds by a solvent bank does not necessarily show making loans as distinguished from deposits; Citizens St. B. vs. Strayer, 114 Neb. 566 (1926), the banking business under a State charter is quasi public and subject to reasonable regulations by the State; State vs. American Ex. Bk., 114 Neb. 626 (1926), certificates of deposit construed; State vs. Atlas Bank, 114 Neb. 646 (1926), court may determine status of deposit; State vs. Atlas Bank, 114 Neb. 650 (1926), depositor defined; State vs. Exchange Bank, 114 Neb. 664 (1926), Banking Board trustee for the Guaranty Fund; Nebraska St. Bk. vs. Bruning, 114 Neb. 719 (1926), draft on insolvent bank subrogated to rights of original holder; State vs. Far. St. Bk., 114 Neb. 826 (1926), time certificate construed; State vs. Citiz. St. Bk., 114 Neb. 867 (1926), excess interest construed; State vs. Far. St. Bk., 115 Neb. 46 (1926), certain deposit construed; State vs. Monowi St. Bk., 115 Neb. 396 and 398 (1926), limiting interest on claims against Guaranty Fund; State vs. Far. St. Bk. of Dix, 115 Neb. 574 (1927), construing Guaranty Fund in relation to assignee of certificate; State vs. Citiz. St. Bk., 115 Neb. 593 (1927), definition of deposit protected by Guaranty Fund; State vs. Citiz. St. Bk., 115 Neb. 593 (1927), tort not protected by the Guaranty Fund; State vs. Macy St. Bk., 115 Neb. 606 (1927), bank run by Banking Department protected by Guaranty Law; same in State vs. Citiz. St. Bk., 115 Neb. 611 (1927); Kuhle vs. Far. St. Bk., 115 Neb. 648 (1927), liability fixed by statute; State vs. Sec. St. Bk., 115 Neb. 667 (1927), deposit not protected by Act; State vs. Far. St. Bk., 115 Neb. 702 (1927), Guaranty Fund payments only pursuant to statute; State vs. Citiz. St. Bk., 115 Neb. 776 (1927), Nebraska Statutes Guaranty Fund, departure from common law, and should not be extended by judicial interpretation; Kuhle vs. Far. St. Bk., 115 Neb. 648 (1927), liability to

come under law; State vs. Sec. St. Bk., 115 Neb. 667 (1927), definition of depositors; State vs. Far. St. Bk., 115 Neb. 702 (1927), statute construed; State vs. Citiz. St. Bk., 115 Neb. 890, depositor in good faith defined; State vs. Sec. St. Bk., 116 Neb. 165 (1927), extent of protection of the Fund; Rogers vs. Nat'l Surety Co., 116 Neb. 170 (1927), defines contract under the Act; State vs. Sec. St. Bk., 116 Neb. 223 (1927), validity of pending claims against the Fund; State vs. Far. St. Bk., 116 Neb. 445 (1928), certificate of deposit within Guaranty Law; Harrison St. Bk. vs. First Nat'l. Bk., 116 Neb. 456 (1928), rights of depositor and bank defined; State vs. Clinton St. Bk., 116 Neb. 482 (1928), deposit not within the protection of the Fund; same, State vs. Clinton St. Bk., 116 Neb. 510 (1928); State vs. Sec. St. Bk., 116 Neb. 521 (1928), protection of Fund; same, State vs. Sec. St. Bk., 116 Neb. 530 (1928); State vs. Octavia St. Bk., 116 Neb. 825 (1928), interest on deposit as against Guaranty Fund; State vs. Citiz. St. Bk., 117 Neb. 358 (1928), defines depositor; State vs. Citizens St. Bk., 117 Neb. 358 (1928), relation of banker and depositor created by contract, express or implied; State vs. Ord St. Bk., 117 Neb. 189, taxes paid out of Fund; State vs. Citiz. St. Bk., 117 Neb. 358 (1928), deposit defined, relation between banker and depositor created by contract; State vs. First St. Bk., 117 Neb. 370 (1928), deposits protected by Fund; McBride vs. Taylor, 117 Neb. 381 (1928), bank free from process of any kind, depositor relegated to Fund; Svoboda vs. Snyder St. Bk., 117 Neb. 431 (1928), holds suit against bank taken over by Department, not suit against the State; State vs. Far. St. Bk., 117 Neb. 448 (1928), defines a deposit; Cleary vs. Fidelity & Deposit Co. of Maryland, 117 Neb. 478 (1928), construed liability of Fund; State vs. Citiz. St. Bk., 117 Neb. 860 (1929), protection under the law; Brownell vs. Svoboda, 118 Neb. 76 (1929), Guaranty Fund Commission under the Guaranty Fund statute judgment creates no lien upon the real estate nor assets of the bank; State vs. Nebraska St. Bk., 118 Neb. 660, (1929), construes Guar-

anty Fund Act in reference to interest; Ex. Rel vs. Farmers St. Bk., 118 Neb. 743, certificate of deposit not chargeable against Fund because of excess rate of interest; Abie State Bank vs. Governor Weaver, 119 Neb. 153 (1930), holding Bank Guaranty Act and special assessment constitutional, assessments not confiscatory, and banks estopped to deny liability for assessment under facts disclosed. (Last decision only appealed to the Supreme Court of the United States on the grounds of taking property without due process of law).

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IN THE

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OF THE

UNITED STATES

October Term, 1930.

Number 63.

ABIE STATE BANK, ET AL., APPELLANTS,

V.

CHARLES W. BRYAN, AS GOVERNOR OF THE STATE OF NEBRASKA; CLARENCE G. BLISS, AS SECRETARY OF THE DEPARTMENT OF TRADE AND COMMERCE; T. W. BASS, AS TREASURER, ETC., ET AL.

APPEAL FROM SUPREME COURT OF THE STATE OF NEBRASKA.

PETITION OF APPELLANTS FOR REHEARING.

FRANK H. GAINES,
LEONARD A. FLANSBURG,
S. S. SIDNER,
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FRANK H. GAINES,
LEONARD A. FLANSBURG,
S. S. SIDNER,
Attorneys for Appellants.

COME NOW the above named appellants, the Abie State Bank, et al., and present this, their petition for a rehearing of the above entitled cause, and, in support thereof, respectfully show:

The decision and conclusion of this Court is based upon, and controlled by, the recent Nebraska statute, effective on March 18, 1930, modifying the Bank Guaranty Law and providing for a "depositors' final settlement fund." That statute was enacted and became a law almost three months after the final decision in this case by the Supreme Court of the State of Nebraska in December, 1929. The appellants did not anticipate that the conclusion of this Court would be based upon the operation of the new law, which preserved and kept in force the assessments complained of, nor that the new law would be held to change the effect of those assessments, and for that reason did not in their original briefs bring to the attention of the Court, nor raise, questions that they would and should have raised had they anticipated such a ruling, and this brief is for the purpose of calling to the attention of the Court and urging a consideration of two propositions supplemental to the questions raised, briefed and argued in the original briefs filed herein.

These propositions are:

I.

The act of March 18, 1930, providing for assessments on the future operating banks to pay depositors in those banks which had failed prior to the enactment of the law, is unconstitutional on its face, in that it takes assessments from one class of banks to pay depositors in another, and deprives the future operating banks of their property without due process of law, and denies

them the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States.

II.

The assessments provided by the act of March 18, 1930 are excessive, burdensome and confiscatory as a matter of fact, and these facts, developing since the commencement of our suit in 1928, we have not so far had opportunity to bring to the attention of the Court, and should be permitted, by a further trial in this case, before the assessments under the new law are finally sustained, to be given a hearing and an opportunity to make a showing in that regard.

BRIEF AND ARGUMENT.

We do not complain of the decision of the Court as to the propositions which were briefed and argued to the Court by the parties in the case. This application is made not for the purpose of gaining a rehearing upon anything decided by the Court on the record in this case but for the purpose of having additional propositions passed upon which were not raised nor asserted by either of the parties prior to the decision of this case by this Court.

The appellees, the State and the Attorney General, did contend that the new law, by the repeal of the old, had rendered our case moot. We took the position that, since the new law preserved the assessments of which we were complaining and continued them in effect, we were not barred from asking relief against them in this case. This Court has held with us in that contention, and held that in this case we could try out the question of the legality of the assessments even as re-

enacted under the new law. We also pointed out to the Court in argument that there were no facts in the record with reference to the new law since the date of the commencement of our case in December, 1928.

We had assumed that if these assessments were illegal and confiscatory when levied, that they continued to be so even after the new enactment, but the Court has held, that, as additional time to pay them is provided, and further future assessments are decreased in amount, it is "unable to say," at least on the present record, that under the new provisions the assessments are confiscatory. This definitely brings the new law and the question of its operation into our case.

That the new law and its operation, in view of conditions during the year since its enactment, will now be controlling of the decision in this case has challenged our attention for the first time. With the new law involved, the two questions which we present have not heretofore been raised, and could not have been raised in the courts below, and we urge that these questions are not only proper but necessary to a determination of whether we are entitled to the relief asked. These questions we could not have raised in the Nebraska courts, for those decisions were prior to the enactment of the new law, and we feel that we are now making a timely and proper presentation of them.

These propositions we do urge now and ask the Court for a determination of them.

Proposition I.

In our original brief we made the contention that, the Depositors Guaranty Fund being hopeless insolvent, the old law in its operation no longer bore a rational

relation to any public purpose, as the collection of future assessments, the ones in question, *regardless of amount,* took away from the security of present depositors in going banks in order to pay alone the depositors in banks that had long since failed, and that the payment of assessments was without hope or tendency of furnishing protection to present depositors. We insisted that instead of the challenged assessments creating a fund for the safeguarding of depositors in going banks, as was the original purpose, they directly defeated that object, and that since the law did not operate at the time we brought our suit for any public purpose, that any taking *in any amount* was a taking without due process of law and confiscatory. This particular attack, however, was upon the operation of the *old* law and this Court has not passed upon that question. We did not raise the specific question with reference to the *new* law, and therefore presented no question as to the new law in that regard for this Court to pass upon.

As we view the new law it emphasizes, magnifies, and makes definitely certain the very kind of defect which we urged against the old.

It provides that from March 18, 1930, the future operating banks shall pay assessments, not to go into a fund by which their own depositors will be protected, but that these moneys shall be taken from the protection of their own depositors, and for the benefit of another class of depositors. These assessments in no way bear any relation to the protection of the going banks. The effect of these assessments is to take from the going banks and to pay to the depositors in banks which failed prior to March 18, 1930, and without any hope or tendency of furnishing protection to present depositors, and in fact directly defeating, in current operation, the object of the

original Bank Guaranty Law. The going banks, by such assessments, are weakened rather than strengthened. The banks paying the assessments receive no reciprocal advantage, for no fund is created or employed for the protection of their own depositors. Such advantages, as are absent here, were pointed out in the original opinion of this Court in *Noble State Bank* v. *Haskell*, 219 U. S. 104, as the justifying grounds of the original law.

The new law in its effect now taxes the going banks to pay the debts of an entirely different class of banks, banks which had failed prior to March 18, 1930. Not only does the law require all future assessments to be paid to this class of banks which failed prior to March 18, 1930, but it also gives *priority* to claimants whose claims had been *allowed and certified for at least one year prior thereto*. Owing to the enormous amount of such claims, these latter mentioned claimants may receive the bulk, if not all, of the future assessments.

On March 18, 1930, the adjudicated claims against the Guaranty Fund had increased to $28,088,706.00, and in addition to this there were $726,094.00 claims against the fund which were in dispute.

By the new law the depositors in these failed banks not only receive the full assessments for their protection up to the time of the enactment of the law on March 18, 1930, both regular and special, but the future operating banks must now add to those payments regular assessments of two-tenths of one per cent per year for the period of ten years; all of these assessments under the new law in no way tending to stabilize or safeguard banking and banking practices in Nebraska, but having the direct opposite effect, in that they impose a direct and additional burden upon these banks without reciprocal

benefits of any kind, and require the transfer of their funds to the depositors of an entirely different class of banks, towards whom there is no reciprocity of benefit, action or conduct.

At the time of the commencement of our suit in December, 1928, the deficit in the Guaranty Fund was around $16,000,000.00, but on March 18, 1930 this deficit had increased so that after deducting the value of the assets, as appraised by their field workers, the actual existing deficit on that date was around $23,000,000.00.

We submit that, if this were an original guaranty law, providing for assessments against the going banks in favor of the depositors in banks which had already failed prior to the enactment of the law, unquestionably the law would be unconstitutional, as an illegal deprivation of the properties of these banks for no public purpose; and we are unable to see how this law, even in the light of a prior existing Guaranty Law, stands upon any different basis, for in its effect and operation it is identically the same as if it were an original initial enactment.

By the opinion of this Court it is held that there was no contractual obligation existing against the banks for the payment of any of these assessments. What obligation there was, if any, was entirely statutory, continuing only so long as the law remained in its operation constitutional.

Illustrative of the effect of the operation of the new law, we wish to call the Court's attention specifically to the following facts:

Since the enactment of this law, in March, 1930, thirty-two state banks have been closed. A list of them follows:

City	*Name of Bank*
Newport	Farmers State Bank
Wahoo	Nebraska State Savings Bank
Touhy	State Bank of Touhy
Weston	Farmers & Merchants Bank
Colon	State Bank of Colon
Valparaiso	Oak Creek Valley Bank
Wahoo	Citizens State Bank
Omaha	Bank of Florence
Arnold	State Bank
Arnold	Security State Bank
Monowi	Ponca Valley State Bank
Denton	State Bank
Norfolk	Nebraska State Bank
Plymouth	Farmers State Bank
Alexandria	State Bank of Alexandria
Fort Calhoun	Washington County Bank
Creighton	Bank of Creighton
Verdigre	Knox County Bank
Pierce	Citizens State Bank
Battle Creek	Valley Bank
Center	State Bank
Orleans	Bank of Orleans
Stuart	Citizens Bank of Stuart
Guide Rock	State Bank
West Point	Nebraska State Bank
Niobrara	State Bank of Niobrara
Platte Center	Farmers State Bank
Madison	State Bank of Madison
Tecumseh	State Bank
Nelson	Farmers State Bank
Columbus	Home Savings Bank
Columbus	Columbus State Bank

Twenty-three of these banks are banks whose names appear on our petition as plaintiffs in this suit. These

banks have operated since the new enactment of March, 1930, and have, by the provisions of the new law, become liable for the assessments provided by the new law. All of the three special assessments and the two general assessments provided by the old law are now by the new law imposed upon all of these above named banks. These assessments deplete the assets of these 32 banks; take from those banks and from their depositors these assets and pay them to banks which had failed prior to the enactment of the law. The operation of the law takes from one class of banks and from one class of depositors and pays to another, depending upon the fact of whether the bank failed prior to March 18, 1930 or after. The depositors in these 32 banks lose to the extent of these assessments. The depositors in the banks failing prior to March, 1930, gain to the extent of these assessments. The law takes from one and gives to another. It is discriminatory. It denies the equal protection of the law, and what has occurred during the year of operation under this law is only an example of what will occur during the future ten-year period of its operation. All assessments collected will never go for the protection of the operating banks nor for their depositors, and all of the state banks that fail during the next ten-year period will contribute, to the prejudice of their own depositors, for the benefit of depositors in banks that failed prior to the enactment of the law.

Had the contention of the interveners been sustained, to the effect that the banks had, by operation under the old law and the acceptance of it, impliedly contracted with all of the depositors in other banks that they would pay their claims, and hence had these banks become liable for the payment of the $28,000,000.00 in claims against the banks which had failed prior to the enactment

of the law, then we could see justification for continuing that liability in effect; but, as we contended and as this Court has *now held*, there was no such contractual or implied obligation, and when the law in its operation becomes unconstitutional, liability for future assessments ceases. When the operation of the law fails to sustain a rational relation to a public purpose, then it must from that moment fail, and the *new* law, even by its *avowed purpose*, does not sustain such a relation to any public purpose.

As pointed out by the Court in its opinion the new law, as by its own terms it declares, was enacted:

> "for the purpose of providing a fund for depositors in state banks closed prior to the time of the new enactment."

The contractual obligation of the banks to their depositors was, as pointed out by the Court in its opinion, an indebtedness existing alone between the individual depositor and the individual bank, and the going banks owe no contractual obligation to the depositors of other banks than their own. The obligation is a private debt owing by the bank to its depositor. The payment of that debt by future assessments against the going banks serves no public purpose. It does not tend to stabilize banking. There is no reciprocity of advantage to the going banks making such payments.

Although the old law created an intolerable burden upon these banks, the new law proposes, by a retroactive effect, to add to the amount that has already been paid during the current operation of the law, which manifestly ceased as a Guaranty Law on March 18, 1930. In addition to the huge assessments provided under the old law, the future going banks must now pay an amount

yearly during the period of ten years, to supplement and add to what they have theretofore paid, for the benefit of the banks which failed prior to March 18, 1930. The new law is based upon that principle, and as to that principle we submit the law must fall as unconstitutional, and that every assessment provided under or preserved under it is tainted with the same fault.

The Supreme Court of Nebraska has held, in *Weaver v. Kochn*, 231 N. W. 703 (Neb.), that, under a law passed since our case was commenced, a general tax levied against the people of the state to pay the depositors in banks that had theretofore failed could not be justified, since it was not a taking for any public purpose but accomplished merely the payment of private debts, and that such a law constituted the taking of money belonging to one class to pay the claims of those of another class. The Supreme Court of Nebraska in that opinion said:

> "But the appropriation of money by the state, to reimburse depositors for losses sustained by them, in failed banks, clearly appears to be the taking of money belonging to one class to pay the claims of those of another class. And this is in violation of the due process provision of the Federal and State Constitutions. • • •
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> "In view of the facts as presented, it clearly appears to us that the losses of individual depositors in state banks cannot lawfully be made up nor paid from the appropriation of money that belongs to all of the people of the state. The deposits herein were merely business transactions between the bank and the depositor, and the public should not be made to pay for the losses that a depositor may have suffered in such transactions."

We think the reasoning and conclusion of the court in that case is directly applicable to the enactment of March 18, 1930.

We submit that the operation of the new law, to create a depositors' final settlement fund, and providing for payment of debts of the banks that failed before the law was enacted, as to the banks appealing in this case, is not in any particular different from the operation of the law, imposing a tax on the people for that purpose, under the statute above named and involved in *Weaver Kochn*, so held to be unconstitutional and to be in violation of the due process clause of the Federal and State Constitutions.

In the operation of this new law, providing for the payment of the debts of the failed banks, there is now no public purpose served. Its purpose is not to make the going banks safe and keep them from failing, but to pay the past accumulated private debts of other banks that have theretofore failed. The same rule to determine whether a public purpose exists would apply as to each of the statutes mentioned. If the payment of the depositors in the banks that failed while operated by the state had borne a rational relation to the stabilization of present banking, to the protection of present depositors, to the prevention of panics and runs on banks, then the law imposing a tax upon the general public would have served a public purpose and would necessarily have been sustained; it would then have been sustained especially in view of the fact that the legislature may meet the moral obligations of the state. But the payment of these depositors in banks theretofore failed served no public purpose now and that law was declared unconstitutional. The Supreme Court of Nebraska in that case said that this clearly:

> "appears to be the taking of money belonging to one class to pay the claims of those of another class."

Just so does the Guaranty Law now take the money of the banks, and take away from the present depositors of those banks their protection, in order to pay the depositors in banks that have failed prior to March 18, 1930. It takes from one class and pays to another. It deprives one class of individuals of protection and benefits another class of individuals, and no public purpose is served thereby.

Since our case was commenced the legislature has, by three distinct methods, made an attempt to raise funds to pay the claims of depositors in banks that had theretofore failed.

One method was by a legislative enactment, requiring payment of part of these claims by general taxes. This is the enactment that the Supreme Court of Nebraska held unconstitutional in *Weaver* v. *Koehn*.

The second method was by the submission of a constitutional amendment to the people to permit the state to borrow $8,000,000.00 for that purpose. This was overwhelmingly defeated at an election in November, 1930.

Both the Supreme Court of Nebraska and the people, by general vote, have recognized the injustice of collecting money from others to pay the past debts of the failed banks.

The enactment of March 18, 1930, of which we are now complaining, is the only method, provided by the legislature, which is now left, through which a part of these moneys was to be provided, and it is unjust, unreasonable and inequitable for exactly the same reasons that the other methods provided by the legislature were found to be, for by this enactment the money is taken from some to pay the private debts of others.

We realize that this Court would not pass upon any constitutional question with reference to any law except that such question is specifically raised, presented and urged, and that we could not expect a decision on this question we are raising now without that question being presented, nor expect this Court on its own motion to hold the new law unconstitutional without that law being attacked on that ground. The opinion of the Court as it stands upholds the new law and without its constitutionality having been challenged by us. This question is one which we feel compelled to, and do now urge, and we respectfully pray the Court's consideration and determination of the question as applied to the new enactment.

Proposition II.

The Court in its opinion says that it is:

> "unable to say that the statute in this modified form is confiscatory, or other than a reasonable method of liquidating the guaranty plan."

We interpret this statement as being based upon the present condition of the record. The statement is not an affirmative declaration that the law is not confiscatory, but is a declaration that the Court, in view of the record and the questions raised, cannot, at this time, so declare, *although the validity of such assessments is considered before it for determination.*

Our suit was commenced in December of 1928. Necessarily our showing of fact continued up to that date and no further. There is not in this record any showing of fact since December, 1928, and we respectfully urge that we be given the opportunity in this case of making such a showing now, and that if the new law is not to

be declared unconstitutional upon the first proposition above urged, that the mandate or opinion at least direct that we be given opportunity in the state courts to make a showing of fact as to whether the assessments under the new law are actually in amount excessive, unreasonable, burdensome and confiscatory.

When our case was begun in 1928 there were 726 banks operating in Nebraska. There are now 574, a decrease of 152.

Some months prior to the commencement of our suit, when it was first learned that the Guaranty Fund was hopelessly insolvent, to the extent of some $16,000,000.00, there were deposits in all of the state banks of some $252,000,000.00. When it was learned that the Fund was not only insolvent but that there was this huge deficit in the Fund, and when it was learned that in the place of there being an actual Guaranty Fund to furnish protection that the depositors in failed banks were claiming that the going banks, on a contractual liability should be held, in addition to what they had paid, to the full payment of the $26,000,000.00 of claims then existing, depositors in going banks lost faith in protection from the law and withdrew deposits.

In July of 1928, several months prior to the commencement of our suit, the hopeless condition of insolvency of the Guaranty Fund was first published in the papers, from a speech disclosing such conditions made by the state's attorney, acting for the Guaranty Fund Commission.

Prior to the trial of our case the Governor of the State of Nebraska, on January 6, 1929, in his inaugural address to the legislature, which address was broadcasted

by radio over the state, described the hopeless insolvency of the Guaranty Fund and pointed out that present depositors were no longer protected. He said:

> "I respectfully call your attention to the fact that the Guarantee Fund, as nearly as I can ascertain, has present and prospective liabilities above present assets of from sixteen to twenty million dollars, that the present income from assessments on banks is approximately one and one-half million dollars; that most of these liabilities either are, or soon will be, reduced to judgment, and the judgments will draw interest at seven per cent, which on a basis of twenty million dollars makes an annual interest charge of one million four hundred thousand dollars; that with any appreciable reduction in this income either from further bank failures, nationalization of some of the present state banks, or seasonable declines in deposits, the income will meet the interest charge only, and no funds will be available to pay the principal; that under such a situation the Guarantee Fund cannot afford protection for present depositors against any such future losses. • • •
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> • • • The state banks of Nebraska have already paid, in their efforts for the protection of their depositors, an amount almost equal to the capital of all state banks, and that a continuation of such a load threatens the whole system."

With these facts made public as to the hopeless condition of the Guaranty Fund and with the asserted claim of huge liability against the banks of $20,000,000.00 made by the interveners in this case, depositors in banks lost faith in any protection from that Fund and there was a consequent and large withdrawal of deposits from state banks, so that the deposits now in the 574 remaining banks have been reduced to $130,000,000.00, there being approximately $113,000,000.00 decrease in deposits

since the insolvent condition of the Fund was first made known in July of 1928.

During the last two years Nebraska has not been exempt from the general business depression, and we submit that before the enactment of March 18, 1930 is passed upon as to the assessments complained of we should be given opportunity to show whether, in view of the present conditions existent during the year in which that law has been effective, the assessments provided thereunder are in *fact* excessive, burdensome, unreasonable and confiscatory.

These facts this Court does not have before it, nor were we able to present such facts to this court, since our case was concluded in the state courts long prior to the enactment of the new law, and we respectfully submit that we should be given opportunity of making a showing of fact and a trial of those issues of fact in this case for the purpose of final determination as to whether the new law is confiscatory in fact.

This Decision Will be Cited as Res Adjudicata as to the Assessments Complained of

The decision of this Court will be cited as res judicata *upon that question and upon all questions pertaining to the validity of the assessments complained of* and without our having had opportunity to make a showing of fact in that regard. In fact that we being publicly asserted by the state now.

This Court in its opinion declares that in this case the Court *has power to grant appropriate relief*; that the assessments complained *of are before it here* for adjudication, and in view of that declaration it is positively incumbent upon us to raise the additional questions presented in this brief and ask for their determination.

In this case *only* can appropriate relief be given. The questions we are raising are proper to be raised here, and since they are proper we must raise them and have them passed upon, or this decision may be held a bar to raising them at any other time. The decision may be a bar not only to questions which are actually raised but those which should properly be raised.

Let us forcibly call to the Court's attention the position in which the banks will be left if relief is not given. The Court has before it the assessments under the old law. The new law provides that *if it is held unconstitutional the old law shall remain in effect*, and this Court alone, if the new law is held unconstitutional, is able to grant relief as against the old assessments. In another suit this decision would be urged as a bar against us, in such event, from bringing another suit against the assessments under the old law.

CONCLUSION

We respectfully submit, first, that the new law is on its face unconstitutional, in that it takes property without due process of law and denies the operating banks the equal protection of the law, and this regardless of the amount of the tax.

And, second, we respectfully submit that the determination of whether or not the assessments provided by the new law are excessive and confiscatory, even if the new law is held to be for a public purpose, is a question of fact, depending upon the effect of such assessments upon the banks, and that we should be accorded opportunity to make such showing, and we submit that the opinion and the mandate of this Court should protect us on the questions now urged.

We respectfully pray that this Court grant us a hearing upon these two propositions.

Respectfully submitted,

FRANK H. GAINES,
LEONARD A. FLANSBURG,
S. S. SIDNER,
Attorneys for Appellants.

CERTIFICATE OF COUNSEL.

I, Leonard A. Flansburg, counsel for the above named appellants, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

Counsel for Appellants.

Leonard A. Flansburg

SUBJECTED COPY

SUPREME COURT OF THE UNITED STATES.

No. 61. October Term, 1930.

Abie State Bank, Appellant,
vs.
Charles W. Bryan, as Governor of the State of Nebraska; Charles G. Ross, as Secretary of the Department of Trade and Commerce; T. W. Bass, as Treasurer, etc., et al.

Appeal from the Supreme Court of the State of Nebraska.

February 23, 1931.

Mr. Chief Justice Hughes delivered the opinion of the Court.

This suit was brought in December, 1928, in the District Court of Lancaster County, Nebraska, by the Abie State Bank on its own behalf and that of several hundred other banks, all chartered under the laws of Nebraska, to enjoin the defendants from collecting special assessments under the Bank Guaranty Law of that State. The plaintiffs challenged the constitutionality of the statute authorizing the levy of such special assessments upon the ground that their collection constituted the taking of the plaintiffs' property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States. A number of depositors in the state banks were permitted to intervene. The District Court entered a decree in April, 1929, in favor of the complainants sustaining the contention that the statute providing for such special assessments was, under the facts shown, unreasonable and confiscatory and hence repugnant to the Fourteenth Amendment. The decree, which gave a permanent injunction, was reversed by the Supreme Court of Nebraska, the injunction was dissolved and the action dismissed. 116 Neb. 150, 225 Northwestern Rep. 920. The plaintiffs appeal to this Court.

The Bank Guaranty Law of Nebraska was originally enacted in the year 1909. Laws of Nebraska, 1909, chap. 10, p. 87; Compiled Statutes of Nebraska, 1929, section 8103 et seq. Its purpose was declared to be to provide a guaranty fund for the protection

of depositors in banks, and every corporation engaged in the business of banking under the laws of the State was declared to be subject to assessment to be levied and applied in the manner stated. Banks were required to report semi-annually to the State Banking Board, succeeded by the Department of Trade and Commerce, their average daily deposits, and it was made the duty of that department twice each year to levy upon each bank an assessment, after certain prescribed initial payments, in the amount of one-twentieth of one per cent. of the average daily deposits reported. By section 9028, as amended in 1923 (Laws of 1923, chap. 191, p. 452), it was provided that if the depositors' guaranty fund should be reduced from any cause to any amount less than one per cent. of the average daily deposits, the Department of Trade and Commerce should levy against the capital stock of the corporations contributing a special assessment not exceeding one-half of one per cent. of said average daily deposits in any one year. In case of non-compliance with the provisions of the statute, the Attorney General was to obtain the appointment of a receiver, and by an amendment in 1925 (Laws of 1925, chap. 30, p. 122), the Department of Trade and Commerce, if its order was not obeyed, was authorized forthwith to take possession of the property and business of the bank and place it in charge of the Guaranty Fund Commission established in 1923 for the purpose of assisting in conserving and administering the guaranty fund (Laws of 1923, chap. 14). It was further provided that in case a bank failed, and its assets were insufficient to meet the claims of depositors, the court should determine the amount of the deficiency and direct the Department of Trade and Commerce to draw against the guaranty fund in the amount required to make up the deficiency. Claims of depositors were to be paid according to priority of adjudication.

Acting under the authority of the statute, the Department of Trade and Commerce for several years made an additional semi-annual assessment against the complaining banks of one-fourth of one per cent. of the average daily deposits. The result was that the total assessment against each of these banks had become an annual charge in the amount of six-tenths of one per cent. of their total average daily deposits.

This suit was begun immediately after the levy, on December 15, 1928, of a special assessment of one-fourth of one per cent. of

the average daily deposits of the complaining banks, and the plaintiffs asked for an injunction restraining the collection of that special assessment and of any future special assessment called for by section 8028. The contention of the plaintiffs was that the Bank Guaranty Law no longer bore a rational relation to any public purpose, as the collection of the assessments in question took away from the security of present depositors in going banks in order to pay the depositors in failed banks, and was without hope or tendency of furnishing protection to present depositors. It was insisted that instead of the challenged assessment creating a fund for the safeguarding of depositors in going banks, as was its purpose, it directly defeated that object, and that its imposition constituted an unconstitutional burden because of its confiscatory character.

The District Court reviewed the results of the operations of the banks in Nebraska under the Bank Guaranty Law. It appeared that there were 1012 banks in the State in November, 1920, and that the number had been reduced to 726 in December, 1928; that these banks had a total capital of $19,001,000 and a total capital and surplus of $24,958,557.62; that for the period of eighteen months preceding June 30, 1928, 570 banks had net earnings and 156 had net deficits; that the total net earnings of both groups for that period amounted to $1,935,519.40 or 7.9 per cent. of the total capital and surplus; that, during the same period, these banks had paid into the depositors' guaranty fund $2,412,324.78. It also appeared from the testimony of the secretary of the Guarantee Fund Commission (as stated by the Supreme Court of the State) that up to December 31, 1928, 269 state banks had been closed by the State and placed in the hands of the Commission and that the total amount of the adjudicated claims was $10,536,518.59, exclusive of interest; and that in 72 state banks, then being operated as going concerns, the amount due depositors was $13,726,441.26, and the total amount due depositors in banks which were in receiverships, but whose claims were not yet adjudicated, was $2,133,627.54. The total claims, including both claims adjudicated and those not adjudicated, or the then existing liabilities against the guaranty fund, amounted to $26,400,282.76, and the total amount of assets to be realized would be $10,451,932.65, leaving a deficit of $15,948,350.11. The Court concluded that "fully two-

thirds of the banks under the existing financial conditions are unable, after paying assessments amounting to 8 per cent. of their capital, to pay compensatory dividends", and that the Bank Guaranty Law, as originally conceived, was "no longer serving its purposes."

Reversing the decree of the District Court in favor of the plaintiffs, the Supreme Court of the State sustained the validity of the continued operation of the Bank Guaranty Law and entered judgment stating that "the levy of a special assessment upon the state banks", pursuant to the provisions of the applicable statute, "does not constitute the taking of private property without due process of law." The grounds of the decision of the Supreme Court of the State, in reversing the judgment of the District Court, were thus stated in the syllabus of the opinion:

"1. 'The banking business, carried on pursuant to a state charter, is quasi-public and, for protection of the public and in its interests, is subject to reasonable regulation by the state.' *Citizens State Bank* v. *Strayer*, 114 Neb. 567;

"2. It is elementary that it is not within the province of the courts to annul a legislative act unless its provisions so clearly contravene a provision of the fundamental law, or it is so clearly against public policy that no other resort remains;

"3. Where a state bank has accepted the benefits arising from the deposits of money pursuant to the terms of the bank depositors' guaranty law, such bank should not be heard, in a proper case, to make complaint of a special assessment upon such deposits which has been levied for the benefit of the depositors' guaranty fund;

"4. Where a special assessment has been levied upon the state banks pursuant to the provisions of section 8028, Comp. St. 1922, as amended by section 26, ch. 191, Laws of 1923, such assessment does not constitute the taking of private property without due process."

In answer to the jurisdictional statement filed by the appellants, the appellees asserted the want of jurisdiction in this Court, upon two grounds; (1) that this Court conclusively adjudicated the validity of the Nebraska law against appellant in the suit heretofore brought on its behalf (*Shallenberger* v. *First State Bank of Holstein*, 219 U. S. 114); and (2) that the decision of the Supreme Court of the State, in its ruling with respect to the question of estoppel, rested upon an independent non-federal ground. The

question of jurisdiction was postponed to the hearing on the merits.

As to the first objection, it is sufficient to say that the Bank Guaranty Law was sustained by this Court as a police regulation (*Shallenberger* v. *First State Bank of Holstein*, *supra*; *Noble State Bank* v. *Haskell*, 219 U. S. 104, 575), and that a police regulation, although valid when made, may become, by reason of later events, arbitrary and confiscatory in operation. *Smith* v. *Illinois Bell Telephone Company*, 282 U. S. 133, 162; *Allen* v. *St. Louis, Iron Mountain & Southern Railway Company*, 230 U. S. 553, 555, 556; *Lincoln Gas & Electric Company* v. *City of Lincoln*, 250 U. S. 256, 268. In the *Shallenberger* case, the suit was brought immediately upon the enactment of the law, and that decision sustaining the law cannot be regarded as precluding a subsequent suit for the purpose of testing the validity of assessments in the light of the later actual experience.

In support of the second objection, and in answer to the contention of the appellants that the findings of fact by the trial court had not been modified by the Supreme Court, the appellees point to the plenary character of the jurisdiction of the latter court in equity cases, and to the statute which makes it necessary for that Court to try the case *de novo* and to "reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence". Section 9150, Compiled Statutes of Nebraska, 1922; *Colby* v. *Foxworthy*, 80 Neb. 239, 245. The appellees insist that reading together the syllabus and the text of the opinion (*Old Colony Trust Company* v. *Omaha*, 230 U. S. 100, 116), it appears that the Supreme Court, exercising its proper authority, made an independent finding as to the waiver or estoppel which the appellees had pleaded in defense. But the federal ground being present, it is incumbent upon this Court, when it is urged that the decision of the state court rests upon a non-federal ground, to ascertain for itself, in order that constitutional guaranties may appropriately be enforced, whether the asserted non-federal ground independently and adequately supports the judgment. *Enterprise Irrigation District* v. *Farmers' Mutual Canal Company*, 243 U. S. 157, 164; *Union Pacific Railroad Company* v. *Public Service Commission*, 248 U. S. 67, 69, 70; *Ward* v. *Love County*, 253 U. S. 17, 22; *Broad River Power Company* v. *South Carolina*, 281 U. S. 537, 540; 282 U. S. 187. As this Court said in

So far as the facts summarized in the opinion of the state court, and in argument, may be deemed to oppose the evidence introduced to show the oppressive character of the Bank Guaranty Law, these facts bear upon the question whether the law had become so burdensome as to transcend in its operation the constitutional limits of state power. But if, as the appellants contend, the continued enforcement of the law in the conditions shown at the time of the suit did involve unconstitutional exactions, we should not be justified in refusing appropriate relief on the theory that the conduct of the banks in their endeavor to do business under the law and to make the best of the State's policy embodied in it were thereby estopped from asserting constitutional right. The appellees say that upon the original enactment of the Bank Guaranty Law and the decision of this Court sustaining it, the state banks could have done one of three things: (1) liquidate and invest their capital in some other business; (2) undertake to organize as a national bank, or (3) apply to the state banking department for a certificate of authority to operate under the Bank Guaranty Law. That is, the state banks had to comply with the law in order to continue in business as state banks. "The fact that a choice was made according to interest does not exclude duress". *Union Pacific Railroad Company* v. *Public Service Commission*, *supra*. The fact that the banks, defeated in their attack on the law, fell into line with the policy of the State and proclaimed the purposes of the law and the contemplated advantages which had led to its enactment, cannot be regarded as depriving the banks of the opportunity of subsequently pointing out that the public purpose in view was no longer being served, and that the interests of the banks were being unreasonably sacrificed by confiscatory exactions in an effort the futility of which had been demonstrated. The banks were not bound for all time, regardless of consequences. The principle that a police regulation, valid when adopted, may become invalid because in its operation it has prov d to be confiscatory, carries with it the recognition of the fact that earlier compliance with the regulation does not forfeit the right of protest when the regulation becomes intolerable. And we perceive no basis for a different rule because the regulation was extolled while being obeyed. We conclude that the constitutional question was properly raised and was decided, and that the judgment under review is not sup-

ported by an independent and adequate non-federal ground. Hence, the appeal was properly brought.

Since the appeal, the situation has been altered by the passage, in March, 1930, by the legislature of Nebraska, of an act which repealed section 8028 (Compiled Statutes of Nebraska, 1922), under which the assessment of December 15, 1928, challenged in this suit, was levied, and modified the provisions of the former Bank Guaranty Law by creating a "depositors' final settlement fund" and providing for a limitation of future assessments.[3] This Court

[3]The important portions of the Act of 1930 (Senate File No. 3, Session Laws of Nebraska, 46th Special Session, March, 1930, Compiled Statutes of Nebraska, 1929, section 8-171 *et seq.*) are as follows:

"8-171. Depositors' Final Settlement Fund, How Comprised. For the purpose of providing a fair and just settlement of the claims of depositors and others heretofore authorized to be paid out of the Depositors' Guarantee Fund, there is hereby created and established a fund to be known and designated as 'Depositors' Final Settlement Fund' which fund shall comprise and consist of the following: (a) All records, accounts, books, documents, property and assets formerly in the possession of or under the control of the Guarantee Fund Commission and now in the possession of the secretary of the Department of Trade and Commerce. (b) All property and assets of every kind and nature, constituting, accruing upon, or derived from what was formerly designated as the Depositors' Guarantee Fund of the State of Nebraska. (c) All property, monies, funds, proceeds, rights, credits, accounts and choses in action, of every kind and nature, constituting, derived from, arising out of, or in any manner connected with, or pertaining to, the assessments, regular and special, heretofore accrued and levied against any and all corporations transacting a banking business in this state for the purpose of establishing, maintaining, or reimbursing what was formerly designated as the Depositors' Guarantee Fund of the State of Nebraska; which assessments, more specifically, are the special assessments levied by the Department of Trade and Commerce on or about December 15, 1928, April 17, 1929, and January 2, 1930, and the regular assessments accrued and levied on or about July 1, 1929, and January 1, 1930. (d) All moneys and funds derived from the annual assessment of two-tenths of one per cent upon average daily deposits of each state bank, levied as provided in Section 2 of this act. (e) All moneys which may hereafter be appropriated out of the state treasury to help pay, or to be applied upon, any deficit in what was formerly designated as the Depositors' Guarantee Fund. (f) Such other moneys, funds, and property as may lawfully accrue to, be paid into, or become a part of the Depositors' Final Settlement Fund. (1930, Special Session, S. F. 3, sec. 1.)

"8-172. Depositors' Final Settlement Fund, Assessments, Levy, Amount, When Made. For the purpose of providing a fund for depositors in state banks closed prior to the time this act goes into effect, every corporation

takes judicial notice of this legislation. *Owings* v. *Hull*, 9 Pet. 607, 625; *Hanley* v. *Donoghue*, 116 U. S. 1, 6; *Lloyd* v. *Matthews*, 155 U. S. 222, 227. The act provides that the "depositors' final settlement fund" shall consist "of all property, moneys, funds, proceeds, rights, credits, accounts and choses in action" arising from the assessments, regular and special, theretofore accrued and levied, for the purpose of maintaining or reimbursing what was formerly designated as the depositors' guaranty fund. Among these assessments, and specifically mentioned, are "the special assessments levied by the Department of Trade and Commerce on or about December 15, 1928, April 17, 1929, and January 2, 1930, and the

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engaged in the business of banking under the laws of this state shall be subject to assessment to be levied, kept, collected and applied as in this act provided. On the first day of January of each year during the period of ten years, beginning with the year 1931, and ending with the year 1940, inclusive, the Department of Trade and Commerce shall levy upon every state bank an assessment of two tenths of one per cent of its average daily deposits during the year ending December 1st last preceding, as shown by the statements required to be made and filed with the department; *Provided*, any state bank may, at its option, at any time during said ten year period, prepay one or more of said assessments at a discount of five per cent *per annum* for the unexpired period aforesaid, in which event the assessments thus prepaid shall be computed upon the average daily deposits in such bank for the period of the three years last preceding such prepayment. All payments of assessments under the provisions of this section shall be made to and become a part of the Depositors' Final Settlement Fund. Nothing in this section shall be construed to bind any corporation transacting a banking business under the laws of this state to pay any assessments accruing or levied after such corporation shall have ceased to do business as a state bank. (1930, Special Session, S. F. 3, sec. 2.)

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"8-175. Administration, Department of Trade and Commerce, Specific Powers, Enumerated. The Department of Trade and Commerce shall have the power and authority to sell, transfer, convey and exchange any property or assets of the Depositors' Final Settlement Fund; to enter into contracts, and to institute, defend, or otherwise participate in any suit or proceeding, involving the property or assets of said fund, or any claims, rights, or choses in action therein or pertaining thereto; to compromise and settle suits, claims, choses in action and all other matters and things pertaining to, or affecting said fund, or the administration, maintenance, or distribution thereof; the intent and purpose of this act being that the department shall efficiently and expeditiously liquidate and reduce to cash, or its equivalent, all the property and assets, tangible and intangible, of said fund, and pay out and distribute the same to those entitled thereto, in the manner and form, and according to

regular assessments accrued and levied on or about July 1, 1929, and January 1, 1930." For the future, and for the purpose of providing a fund for depositors in state banks closed prior to the time of the new enactment, there is to be levied upon every state bank "on the first day of January of each year during the period of ten years beginning with the year 1931, and ending with the year 1940, inclusive", an assessment of "two-tenths of one per cent of its average daily deposits during the year ending December 1st

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the plan hereinafter set forth: *Provided*, nothing in this act shall authorize the Department of Trade and Commerce to reduce any Assessment required to be levied against banks under the provisions of this act, and *Provided further*, the Department of Trade and Commerce may, in its sound discretion, grant to any bank an extension of time, not exceeding 3 years from the date of the passage of this act, within which to pay any of the assessments, regular or special, heretofore made, levied, or accrued against, or payable by such bank, as defined in subsection (c) of Section 1 of this act. (1930, Special Session, S. F. 3, sec. 4.)

"8-176. Claims, Payment. Only owners and holders of the following described claims and rights shall be entitled to receive payment from the Depositors' Final Settlement Fund and to participate in the benefits thereof, to wit: 1. Unpaid claims of depositors and of others entitled to priority, as by law provided, which shall have been heretofore or hereafter adjudicated against insolvent state banks of this state, including those banks which have heretofore closed and those which hereafter and prior to the time this act goes into effect, shall have been closed by the Department of Trade and Commerce: *Provided*, such claims have been heretofore certified to the department as claims against the Depositors' Guarantee Fund, or shall have been hereafter certified to the department as claims entitled to the benefits of the Depositors' Final Settlement Fund. (1930, Special Session, S. F. 3, sec. 5.)

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"8-178. Specific Sections, Repeal. That said Sections 7995, 8008, 8028 and 8033, Compiled Statutes of Nebraska, 1922, as amended; Sections 22 and 23 of Chapter 191, Laws of 1923; and Sections 8024, 8025, 8026, 8027, 8009 and 8035, Compiled Statutes of Nebraska, 1922; as heretofore existing are hereby repealed. (1930, Special Session, S. F. 3, sec. 16.)

"8-179. Inducement for Passage, Constitutionality, Construction. The inducement for the passage of Section 16 of this Act, which repeals various sections of the statutes relating to the bank depositors guarantee fund and assessments therefor, is the passage of sections 1 to 5, inclusive, of this Act, and if any one or more of said sections 1 to 5, inclusive, of this Act, shall for any reason be held unconstitutional or invalid, in whole or in part, then and in that event said section 16 of this Act shall be invalid and of no force or effect and the sections of the statutes sought to be repealed by said Section 16 shall be in full force and effect. (1930, Special Session, S. F. 3, sec. 17.)"

last preceding." The effect of this provision is to reduce assessments for the future from a total annual amount of six tenths of one per cent of the average daily deposits that is provided by the original regular assessment of one-tenth of one per cent and the special assessments of five-tenths of one per cent, to a total of two-tenths of one per cent per annum for a period of ten years. The depositors' final settlement fund is to be distributed among depositors in banks closed prior to the taking effect of the statute. The Department of Trade and Commerce has authority to administer the fund and to institute and defend suits involving any claims or rights pertaining thereto. That Department has power in its sound discretion to any bank an extension of time not exceeding three years, from the date of the passage of the act, within which to pay any of the assessments theretofore levied against it.

The appellees, who are state officers, urge that by the legislation the case has become moot. The appellants and the appellees who are intervening depositors assert the contrary and we agree with the latter view. Despite the repeal of section 8028 the assessment of December 15, 1928, which was assailed in this suit, is continued in effect, and the amount due thereon is to be made a part of the depositors' final settlement fund. The other special assessments, to which the new act refers, those of December 17, 1929, and January 2, 1930, also remain in force. While the repeal of section 8028 prevents further assessments under the old law, still assessments which were enjoined by the District Court and which were sustained by the judgment of the Supreme Court are to be paid, and the amounts are to be applied as the act of 1930 directs. If, taking into consideration the limitations of the new legislation, the appellants could still be considered to have constitutional grounds for objecting to the collection of the special assessments which were the subject of their petition, they are not deprived of their right by the statute which leaves them with liability for those assessments. It would still be possible for this Court to grant appropriate relief. *Fidelity & Deposit Company* v. *Tafoya*, 270 U. S. 426, 433. *See Groesbeck* v. *Duluth, South Shore & Atlantic Railway Company*, 250 U. S. 607, 609. *Burton* v. *Jackson*, 260 U. S. 309, 313.

While the case has not become moot, the questions raised by the appellants must be considered in the light of the modifying

were concerned with the purpose of promoting the public welfare and with trust in the legislature to modify its regulation when the public welfare was deemed to require a change. We see no reason to doubt the power of the legislature to extricate the banks and the administration of the guaranty fund from the serious plight in which they were found under the operation of the old plan and to exercise a reasonable discretion in seeking this result.

We return to the contention of the appellants. When the suit was brought, these banks were confronted with a situation which contained no promise of relief from the assessments for which the act as it then existed provided, and the cumulative effect of which was alleged to be disastrous. It was the special assessments under the old law that were definitely assailed. Under the modifying act of 1930 only three of these special assessments and two regular assessments remain effective, and, for the future, there is a limitation of the obligation to a total annual assessment of two-tenths of one per cent of average daily deposits instead of assessments aggregating six tenths, as were made possible by the previous law. The future assessments, to this restricted amount, are limited to a period of ten years. This, obviously, is a change of great importance. The appellants sought an injunction, and their petition necessarily related to the assessments in December, 1928 and thereafter, as the payments previously made were not in any event recoverable by the banks. Considering the reduction in the extent of the obligation as to future assessments, we are unable to say that the statute in this modified form is confiscatory, or other than a reasonable method of liquidating the guaranty plan. In this view, the judgment of the Supreme Court of the State denying an injunction should be affirmed.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.